SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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YORKTOWN SMART GROWTH, VINCENT SCOTTO, YORKTOWN GAS MART, INC., and QUICK STOP CENTRAL AVE., INC.,

DECISION & ORDER

Petitioners/Plaintiffs,

Index No. 1880-15

For a Judgment pursuant to CPLR Articles 30 and 78 and 86

- against -

THE TOWN OF YORKTOWN, THE TOWN BOARD OF YORKTOWN, THE PLANNING BOARD OF YORKTOWN, UB YORKTOWN, LLC, REALTY INCOME PENNSYLVANIA PROPERTIES TRUST 2, BJ'S WHOLESALE CLUB, INC.,

Respondents/Defendants.

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WALSH, J.,

This action arises out of the approvals issued by the Town Board of Yorktown ("Town Board") and the Planning Board of Yorktown ("Planning Board") concerning: (1) the rezoning of a portion of a shopping center located on Route 202/35 in Yorktown, New York known as the "Staples Plaza" from a C-1 to a C-3 Zoning District; (2) the issuance of special use permit ("SUP") to the applicant Respondents, including BJ's Wholesale Club, Inc. ("BJ's"), to allow for the construction of a gasoline filling station ("GFS") in the BJ's parking lot located on Lot 76 (the "BJ's Project"); (3) the negative declaration issued under the State Environmental Quality Review Act ("SEQRA") with regard to the rezoning and SUP; and (4) the site plan approval issued by the

Planning Board.[1] The gravamen of Petitioners' Amended Petition/Complaint (hereinafter "Petition") is that the proposal to rezone the site to allow for a GFS was the result of the Town Respondents' approval of a Costco Retail Store and GFS up the street from BJ's and that BJ's only sought the approvals for its GFS so that it could compete with Costco. However, the Costco Project has since been abandoned based on a stipulation of settlement among the parties in the related action.

In this Article 78/Plenary Proceeding brought pursuant to CPLR §§ 7803(1), (2) and (3), Petitioners-Plaintiffs Yorktown Smart Growth ("YSG"), Vincent Scotto ("Scotto"), Yorktown Gas Mart, Inc. ("YGM) and Quick Stop Central Ave., Inc. ("Quick Stop") (together "Petitioners") seek to: (1) annul the December 19, 2014 negative declaration made by the Town Board pursuant to SEQRA; (2) annul the resolution rezoning a portion of the Staples Plaza from a C-1 to a C-3 Zoning District; (3) annul the SUP for the BJ's GFS issued on December 19, 2014; and (4) annul the approval of the Amended Site Plan application by the Planning Board on May 4, 2015 (Petition at ¶¶240-41). Respondents-Defendants Town of Yorktown, Planning Board and Town Board are referred to herein as "Town Respondents."

Petitioners take issue with the fact that it was the rezoning of the BJ's Site from a C-1 to a C-3 Zoning District where retail and wholesale uses are permitted as of right, and a GFS permitted with a SUP, that enabled the Town Board to issue the SUP to BJ's. In addition to answering the Petition, Respondents move to dismiss Petitioners' Petition/Complaint on various grounds. Petitioners oppose Respondents' motion.

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[1]In addition to the construction of 6 gasoline fuel pumps (12 fueling stations), a 4,105 square foot canopy and a 200 square foot attendants' booth (kiosk) that would allow BJ's customers to purchase fuel, the Project also involved the construction of 3,000 square feet of retail space on Lot 76 that was to remain in the C-1 Zoning District. Petitioners originally joined their challenges concerning this Project with their challenges to a project to build a Costco Wholesale Club and GFS on property up the street from the Staples Plaza. Pursuant to a Decision and Order dated October 16, 2015, the prior justice presiding over the Environmental Claims Part, Hon. Francesca E. Connolly, J.S.C., granted Respondents' motion to sever the claims concerning the projects and directed Petitioners to purchase a separate Index Number and amend their Petitions to assert the claims regarding the two projects in separate proceedings. The proceeding concerning the Costco Project was settled and the proceeding was discontinued pursuant to a Stipulation of Discontinuance, which was so-ordered on September 21, 2016.

According to Petitioners, the Town Board and Planning Board (1) failed to "perform actions enjoined upon them by law [CPLR 7803(1)]"; (2) acted "in exceedance of [their] lawful authority [CPLR 7803[2]])"; and (3) made determinations that were "arbitrary and capricious and an abuse of discretion [CPLR 7803[3]])" and in reliance of errors of law (Petition at ¶ 5). In this regard, Petitioners contend that the Town Board possesses "limited authority to adopt resolutions to rezone property, and issue special use permits, subject to compliance with [Yorktown's Comprehensive Plan "CP"], zoning code ... the 'Routes 6/35/202 Bear Mountain Parkway Sustainability Study' (SDS)," the laws and regulations of New York (*i.e.*, SEQRA, and Town Law§ 272-a[11]), and the Constitutions of New York and the United States (Petition at ¶ 11).[2]

FACTUAL BACKGROUND

A. The Parties

Petitioner YSG is alleged to be a not-for-profit dedicated to the proper implementation of the CP whose members (including its Chair Jonathan Nettelfield), reside, own real property and pay taxes in Yorktown (Petition at ¶ 6, *citing* Affidavit in Support of Jonathan Nettelfield, sworn to November 7, 2015 ["Nettelfield Aff."]). Petitioner Scotto is a YSG member and resides, since 1974, at 2460 Mill Pond Street, Yorktown, New York on the banks of the Hunter Brook, downstream from the Staples Plaza. Scotto avers that various developments upstream from his property have caused his property to flood, leaving silt and pollutants in his backyard (Petition at ¶ 7; Affidavit in Support of Vincent Scotto, sworn to November 4, 2015 ["Scotto Aff."]). According to the President of Quick Stop, Faisal Akram ("Akram"), Quick Stop operates a Gulf station located at 3451 Crompond Road, within several hundred feet of the BJ's Project. Akram avers that he would not have purchased such a small site with such a small convenience store

[2]Petitioners describe the SDS as an effort in 1999 by federal, state, county and local agencies to develop a long term plan to reduce traffic congestion on the Rt. 35/202 Bear Mountain Triangle ("BMT"), create more livable neighborhoods and communities, encourage strategic investment by encouraging hamlet style development rather that strip malls, and discourage the promotion of GFSs (Petition at ¶¶ 27-38). After the adoption of the SDS, it is alleged that Yorktown spent many months adopting the CP.

(under 1000 square feet) if he had known that the Town "was going to ignore their zoning code and allow combination big box stores and supersized GFSs with over-sized signage to be sited nearby" (Petition at ¶ 8 and Affidavit in Support of Faisal Akram, sworn to November 6, 2015 ["Akram Aff."]). According to YGM's President and sole shareholder, Reyad Mussa ("Mussa"), Petitioner YGM is the operator of the Mobil Station at 3205 Crompond Road, and YGM was denied approvals from the Town to place signage on his canopy and to build a larger convenience store. Despite the Town's denials, Mussa invested $800,000 in acquiring the GFS and an additional $150,000 in upgrades to its GFS/convenience store and storage tanks (Petition at ¶9, Affidavit in Support of Reyad Mussa, sworn to November 4, 2015 ["Mussa Aff."]).

In addition to the Town Respondents, the remaining Defendants-Respondents are: (1) BJ's; (2) the owner of Tax Lot 75 (*i.e.*, the 7.3 acre parcel where the BJ's store is located), Realty Income Pennsylvania Properties Trust 2 ("Realty Income"); and (3) the owner of Tax Lot 76, UB Yorktown, LLC ("UB Yorktown") (Petition at ¶¶ 12-14).

B. Petitioners' Contentions in Support of their Petition

In support of their Amended Petition, Petitioners submit (1) the Amended Petition, (2) the affidavit of Paul Gill, sworn to October 29, 2016 ("Gill Aff."), a member of Lyrics Gas Corp., which is the operator of the Hess Mart gas station located at 3911 Crompond Road, 1.7 miles west of the Site; (3) the Mussa Aff. for YGM; (4) the Akram Aff. for Quick Stop; (4) the Scotto Aff.; (5) the Nettelfield Aff.; (6) the affidavit of Petitioners' traffic consultant, Michael Maris, sworn to October 30, 2016 ("Maris Aff."); (7) the affidavit of Petitioners' water impacts expert, Dr. Dharmarajan Iyer, Ph.D., PE, sworn to October 31, 2015 ("Iyer Aff."); and (8) a memorandum of law ("Ps' Mem. of Law").

According to Petitioners, as a result of traffic congestion along the Rte. 35/202 corridor, in May 1994, the Town adopted the GFS Ordinance (Code §300-46) which limited: (1) the massing and scale of a GFS to (a) no more than 2 fuel pumps per 3,000 square feet of lot area, (b) canopies to a maximum of 18 feet, (c) driveways to more than 2 at no more than 35 feet wide, (d) 5 parking spaces per 1000 square feet of convenience store area, (e) no illumination over 20' high, (f) no more than 60 feet of total signage, and (g) display of fuel pricing limited to the pumps and not the

canopies (Petition at 7, n10); (2) the use to the sale of motor fuels and lubricant and the use of a convenience store as an accessory use (Petition at 7, n11; Ps' Mem. of Law at 9); (3) siting (no more than 2 allowed within 1,000 feet of each other and none allowed within 300 feet of a playground) (Petition at 7 n12); and (4) hours of operation (Petition at ¶ 21; Ps' Mem. of Law at 9). The crux of Petitioners' Petition revolves around their position that "GFSs are only allowed as a 'primary use' on C-3 zoned property .... The Code does not allow a GFS as an accessory use" (Petition at ¶¶ 22-23; *see also* ¶¶ 82-89; Ps' Mem. of Law at 9-10, 12 n.19, *citing* Code § 300-21[C][12][B][5]). Petitioners assert that accessory uses are not permitted under Section 300-46 (Ps' Mem. of Law at 10, 13). Petitioners further contend that under the Code, convenience stores have to be housed within the main gasoline station building (*id.* at 9, *citing* Code § 300-46[A][2] and 300-46[H]). It is Petitioners' position that the Staples Plaza retail component is the principal use whereas the small kiosk selling BJ's brand of gasoline is accessory use (subordinate to the principal use). Petitioners contend that further evidence that it is an accessory use is that the selling of the gasoline is limited to BJ's members only (*id.* at 14). According to Petitioners, "[t]he Town has never allowed GFSs as an accessory use and has consistently limited retail expansion beyond the scale of a convenience store which again, 'shall' only be permitted as located 'within' the GFS. §300-46(A)(2)" (*id.* at 14).

According to Petitioners, the "CP Policy 4-24 provides the guidelines and limitations for the BJ's site's redevelopment as an integrated mixed-use plan" – *i.e.*, the BJ's site "should have a mix of uses, including a 'Main Street' shopping spine, with limits on floor area and an emphasis on small stores, possible second-floor apartments, and professional offices, in a pedestrian-oriented format" (Petition at¶ 46). Petitioners also rely on CP Policies 4-21 and 5-2 (*id.* at ¶¶47-48). Petitioners argue that despite the clear mandate of the CP, as well as the Town's agreement to pursue less auto-centric uses in exchange for the $12 million the Town received from the federal government with regard to the SDS[3], the Town reneged on its promise of "reshaping the Staples

[3]According to Petitioners, the $12 million was to be used for new turning lanes, road widening and the reconstruction and signalizing of the Stoney Street intersection in the BMT at the Staples Plaza. However, the commitment to allocate the $12 million was contingent on the Town's commitment to pursue reduced-density mixed-use development with workforce housing for the Staples Plaza (Ps' Mem. of Law at 2, 4). Petitioners contend that the "Stoney Street intersection

Plaza into a village-style hamlet promoting public welfare, diversifying housing and reducing auto dependence" and instead "used it police powers to advance one national corporation's business strategy by permitting a new discount members-only fueling station" (Ps' Mem. of Law at 3).

In support of the alleged impropriety of the Board's decision to rezone the Tax Lots and issue the SUP, Petitioners rely on the fact that the Town Respondents had rejected a proposal to rezone to a C-3 District another property located close to the BJ's Project (the "State Lands Site") because they did not want to allow for additional undesirable uses, namely GFSs (*id.* at ¶¶ 53-59; *see also* Ps' Mem. of Law at 4 [Town "Board forced State Lands to amend its rezoning petition from C-3 to C-1 on the finding that GFSs were one of the most intensive commercial uses and thus should be discouraged along Rt. 202/35, consistent with the goals of the SDS and CP"]). Petitioners argue that the decision to rezone is antithetical to the policies set forth in the CP and SDS since

> [t]here is no mixed-use village-style center with intersecting greenways. The BJ's rezoning does not promote "implementing smaller scale construction projects" nor does it "[a]void repeating Route 6 development patterns on Route 202/35." There is no "hamlet-type center[s]" to "emphasize natural resource protection, [and] congestion management" (SDS at 1, 9, 11-12) and housing opportunities (CP Policy 5-2) are prohibited by the Code's GFS definition. Chapter I of the SDS included a redevelopment proposal for Staples Plaza. (See Petition at ¶38). That sketch does not include a GFS and at no point in the SDS or CP is a GFS recommended for the Staples Plaza. And, nowhere in the SDS or CP is there identified a lack of gasoline resources to meet public need" (Ps' Mem. of Law at 25).

In addition to the argument that the only reason for the BJ's Project was so that BJ's could compete with Costco, Petitioners oppose the rezoning on the grounds that: (1) it was Type I Action requiring an Environmental Impact Statement ("EIS") and not an Environmental Assessment Form ("EAF"); (2) it was inconsistent with the CP; (3) it was unauthorized by the Town Code; (4) traffic and water quality impacts had not been addressed; (5) it was illegal spot zoning; and (6) it would negatively impact neighboring property values and displace owner/operators of the economically distressed gas stations in the 5-mile retail Inner Market Area ("IMA") (Petition at ¶73). According

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was 'rewarded with priority consideration for funding of this Plan's recommendations' precisely because Yorktown promised to pursue less intense development. SDS 1-2. The Board reneged on that promise by allowing BJ's to expand converting the federal/state transportation dollars from a public benefit to BJ's private economic gain" (Ps' Mem. of Law at 26).

to Petitioners, it is well settled that a municipality may only use its police powers (*e.g.*, zoning laws) to promote the public welfare and it may not use such powers to simply assist a particular private corporation's business model (Ps' Mem. of Law at 20-23). Therefore, it is Petitioners' position that since the rezoning at issue would cause a public detriment in terms of its (1) impact on traffic, (2) inconsistency with the goals of the CP and SDS, (3) impacts on stormwater and water quality, and (4) impacts on community character/socioeconomic, the Town Board's rezoning from C-1 to C-3 must be annulled (*id.* at 23-26).

The arguments concerning the impropriety of the negative declaration under SEQRA overlap Petitioners' issues with regard to the rezoning since Petitioners argue (1) the Town Board misclassified the action as Unlisted; (2) failed to consider impacts to the Hunter Brook; (3) relied on Costco's inaccurate traffic data; (4) failed to consider the project's cumulative impacts when combined with the State Lands and Costco projects; (5) failed to address the Project's inconsistency with the SDS and CP; and (6) failed to address socio-economic issues regarding impacts to nearby GFS owners and reduction of potential housing (Ps' Mem. of Law at 29-30; Petition at ¶¶ 127-148).

According to Petitioners, in a letter dated December 16, 2014 (Ps' Ex. 13), they advised the Town Board that the BJ's Project had the potential to significantly impact the environment requiring the preparation of an EIS and should have been classified as a Type I Action because although rezonings of 25 acres or more are listed in SEQRA as Type I actions, this threshold is reduced by 75% to 6.25 acres if the rezoned land is adjacent to a parkland (Petition at ¶¶ 127-128, *citing* 6 NYCRR § 617.4[b][10]). Based on an aerial photograph, Petitioners contend that because the Town "Board's rezoning changes the use of 10.10 acres[4] of the C-1 zone to a C-3 zone and Tax Lot 76 is substantially contiguous to state parkland, the action should have been classified as a Type I action" (*id.* at ¶ 130). In support of their position, they rely on the SEQRA handbook's definition of substantially contiguous as "intend[ing] to cover situations where a proposed activity

[4]While the original rezoning petition requested the rezoning of all of Lot 75 and part of Lot 76 totaling 10.10 acres, the rezoning petition was tweaked during the meetings before the Yorktown Planning Board so that there would be a C-1 buffer between residential zoning and the C-3 zoning and the Court understands that the actual number of acres rezoned was 4.6 acres on Lot 75 and 2.8 acres on Lot 76, for a total of 7.4 acres.

is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact," Petitioners argue that because the state parkland is located directly across from Lot 76, the Town Board should have classified the rezoning as a Type I action (Ps' Mem. of Law at 30).

In support of their argument that the Town Board's SEQRA review concerning water quality impacts (Petition at ¶¶ 133-141), Petitioners assert that "the project discharges its stormwater into the Hunter Brook, a state-classified trout spawning stream [(C)TS][5]and a major tributary of the New Croton reservoir which serves as the drinking water source for millions of New Yorkers, including one million residents in lower Westchester" (Petition at ¶ 133). According to Petitioners, Scotto has averred in his affidavit that since the construction of the Staples Plaza, his property has been flooded and the flooding has discharged pollutants onto his property. Petitioners go so far as to state that "the BJ's shopping center has been polluting the Hunter Brook for more than twenty years. NYCDEP never crafted a remediation plan for BJ's untreated stormwater discharges. (See Petition ¶¶ 135-136)" (Ps' Mem. of Law at 38). It is Petitioners' position that the BJ's Project will exacerbate this flooding and pollutant discharge problem as "gasoline stations are known threats to water quality ...." (Ps' Mem. of Law at 40). In this regard, Petitioners assert that "BJ's proposed operation of a 12-pump fueling facility with a 62,000-gallon gasoline subsurface tank selling millions of gallons of gasoline a year with storm drains emptying directly into the Hunter Brook presents a potentially significant environmental impact from gasoline spills and untreated runoff" (Ps' Mem. of Law at 38).[6] In support, they rely on a memorandum written by Dharmarajan Iyer, Ph.D., P.E. to Petitioners' counsel dated December 9, 2014 (Ps' Ex. 18), as well as Dr. Iyer's affidavit submitted in support of the Petition, to establish that Dr. Iyer: (1) advised the Town Board that the project sponsor failed to identify the receiving

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[5]Petitioners contend that the DEC's classification of the Hunter Brook as a C(TS) means that it is "deserving [of] the highest order of protection. Any discharge causing changes in PH, reductions in DO and increases in nutrient levels and temperature are prohibited" (Ps' Mem. of Law at 37, *citing* 6 NYCRR §§ 703-704).

[6] In support, Petitioners rely on the DEC's Spills Database that "documents numerous instances of reported spills at gas stations with causes including equipment failure, human error, deliberate action and tank failure" (Ps' Ex. 16 at 4).

waters for the project's stormwater discharge and given the proximity to the Hunter Brook, it is likely that it discharges into the Hunter Brook and a site plan for the BJ's site "shows a drainage pipe extending from the site into Rt. 202/35 with an open-ended terminus" (Ps' Mem. of Law at 38); (2) advised the Town Board that the Stormwater Pollution Prevention Plan ("SWPPP") which "merely consists of an oil/water separator and a hydrodynamic separator, will not improve stormwater water quality with respect to many of the ubiquitous pollutants of concern (*i.e.*, soluble gasoline compounds, salt and phosphorus) expected from the routine operations and spills at the gasoline facility. It is merely designed to remove oil/grease and suspended solids. The ubiquitous dissolved pollutants will be discharged into the watershed with the stormwater, unless it is further treated prior to discharge" (Ex. 18; *see also* Affidavit of Dharmarajan Iyer, Ph.D., P.E., sworn to October 31, 2015 ["Iyer Aff."] at ¶ 18 [the ubiquitous pollutants were identified to include benzene, toluene, ethylbenzene and xylene, salts (chlorides of calcium, magnesium, potassium and sodium) from salting of pavement, and dissolved phosphorous]; (3) opined that the negative declaration which ignored the potential for these contaminants to be discharged into the Hunter Brook and the Croton Reservoir Watershed "lack[ed] scientific and rational basis" (Iyer Aff. at ¶ 20). According to Petitioners, the Town Board's "failure to comply with the 'hard look' test, requiring identification and a reasoned elaboration as to water resources that may be impacted and the project's compliance with regulations requiring phosphorous reductions, requires judicial annulment of the negative declaration" (Ps' Mem. of Law at 40). According to Petitioners, these phosphorus reduction regulations are applicable to the Croton Watershed to protect New York City's and Westchester's water supply and include (1) "New York's Total Maximum Daily Load (TMDL) program [which] requires annual reductions of Yorktown's non-point source phosphorus loadings by 1356 kilograms (2989 lbs)" (*id.* at 36); (2) DEC's stormwater permit that requires Yorktown to "'develop, implement and enforce a stormwater management program (SWMP) to reduce the discharge of pollutants from their MSFs in accordance with NYS Environmental Conservation Law and the Clean Water Act'" (*id.*); and (3) DEP's watershed regulations, which a numerical Water Quality Standard (WQS) requiring "'[t]otal phosphorous concentrations shall be equal to or less than 15 micrograms per liter'" (µg/l) in the New Croton reservoir (*id.* at 37). Petitioners note that the New Croton regularly has phosphorus concentrations that violate the WQS

of 15μg/l and the Hunter Brook is one of the most significant pollutors of the New Croton (*id.*). According to Petitioners, the Town Board failed in its SEQRA review to consider the impacts to pollutant discharges into the Hunter Brook that the GFS would engender since the EAF merely stated that "'[t]he proposed system will continue to discharge the stormwater runoff to the NYSDOT stormwater infrastructure located on Crompond Road [Rt. 202/35]'" (*id.* at 39).

With regard to the alleged inadequacy of the traffic study, it is Petitioners' position because the Costco GFS was expected to sell between 10-18 million gallons of fuel per year and the BJ's GFS was expected to sell 4-5 million gallons of fuel per year, the traffic improvements would not be sufficient and they "advised the Town that Costco would overwhelm the already congested Rt. 202/35 corridor with as many as a thousand vehicles daily and that the proposed traffic improvements would not be sufficient" (*id.* at ¶ 63, *citing* Ps' Ex. 8 [Cover letter and DEIS Review Comments prepared by Tim Miller Associates, Inc. dated October 15, 2012]; Ps' Ex. 9 [Letter dated September 29, 2014 from Michael Maris Associates, Inc. ("MMA") to John Tegeder, RA, Planning Department][7]; Ps' Ex. 10 [Letter dated October 31, 2014 from MMA to Richard Fon, Planning Board Chair][8]). Petitioners contend that "[c]umulative traffic impacts from Costco,

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[7]The crux of the comments received from MMA is that the Revised Traffic Impact Study prepared by Maser Consulting P.A. dated June 6, 2014 ("TIS") was flawed because the trip generation estimates were based on data published by the Institute of Transportation Engineers, which provides trip generation rates for Discount Clubs based on surveys of different discount stores – not just Costco. MMA contended that the TIS should have been based on the surveys performed by VMI-Maris, which is a d/b/a of MMA, on two Costco stores, one in Melville, New York and one in Hackensack, New Jersey. MMA also argued that the pass-by rate (*i.e.*, the assumption in the study that a substantial number of drivers that currently use Route 202 will become Costco members) was overstated and the proper percentage should be 10 percent. According to MMA, the actual number of trips should have been doubled. MMA also contended that the generated trips may not be accurate because, *inter alia*, the TIS should have used a Gravity Model analysis.

[8]In this letter, MMA reiterates the same arguments made in the September 29, 2014 letter to come to MMA's conclusion that the actual generation rates should be 904 total trips during the Peak PM Highway Hour and 1,117 total trips during the Peak Saturday Hour, which number should only be reduced by 10 percent to account for the Pass By traffic already existing (Ex. 10.). MMA also asserts that the trip generation in the Revised TIS was flawed because (1) it included trip generations for a small residential development on the State Lands Site rather than what was likely to be developed on the State Lands Site, which, according to Petitioners, would

BJ's and the State Lands project were not examined" (*id.* at ¶ 63, *citing* Ps' Ex. 11). According to Petitioners, they submitted expert comments to the Town Board (Ps' Ex. 11), wherein their expert opined:

a. The Traffic Study analyzed conditions only at the site driveway and did not consider the project's impacts at nearby intersections that are known to experience congestion.[9]

b. The Traffic Study is based on traffic projections presented in the Costco study which was based on 2009 traffic counts,[10] as well as underestimated the future traffic volumes in the area.

c. The Staples Plaza traffic generation estimates for the 12 pumps and the urgent care facility are not based on substantive data and may be underestimated.

d. There appears to be an error in the Peak PM Hour volumes used in the capacity analyses that has resulted in better traffic conditions than will actually be experienced.

e. Even with the low traffic projections, the Traffic Study shows that movements at the Staples driveway will experience very long delays and traffic congestions during the Peak Saturday Hour (Ps' Ex. 11 at 4).

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include retail space in accordance with a plan approved by the Planning Board on December 17, 2013, which rezoned the State Lands Site to include 240,000 square feet of retail space; and (2) the trip generations for the BJ's Project were not included (Ps' Ex. 10).

[9] In this regard, Petitioners' expert found fault with the Traffic Study's failure to assess the impacts of the increased traffic at the intersections of Routes 202/35 and the Taconic Parkway (Ps' Ex. 16 at 7-10). According to Petitioners' expert, Michael Maris, a traffic study had to be performed to assess the cumulative impacts because "the Sensitivity Analysis shows that the US Route 202/NYS Route 35 and the Taconic State Parkway Northbound Ramps intersection will operate at capacity with the lower volumes. Obviously the higher volumes resulting from the three developments will create congestions and very long traffic delays at this key intersection relied upon by commuters and businesses throughout Yorktown, Peekskill, and Cortlandt" (Affidavit of Michael Maris, sworn to October 30, 2015 at ¶ 12).

[10] According to Petitioners, "Yorktown Planning Board's traffic consultant found [the data] to be outdated in 2013" (Ps' Ex. 16 at 5-6, *citing* Jacobs Engineering Report, *Traffic Impact Analysis and Site Plan Review of the Proposed Costco Wholesale Club*, prepared for Yorktown Planning Board June 2013, published with Costco FEIS in Volume 6).

Petitioners' counsel advised the Town Board that based on the Maris October 31, 2014 peer review, by ignoring the cumulative impacts of the BJ's Project, the Costco Project and the State Lands Project, the Costco projections upon which BJ's relies are 3.2. to 4.3 lower than anticipated peak traffic volumes (*i.e.*, "BJ's only modeled about 1/3 to 1/4 the traffic ...the three Projects are likely to cumulatively generate") (Ps' Ex. 16 at 6). Maris also found fault with the study's reliance on the traffic volume from a BJ's store in Brookfield, Connecticut as not being analogous to the BJ's in Yorktown which is next to the Taconic State Parkway (Ps' Ex. 16 at 6-7). [11]

Based on the foregoing, Petitioners argue that the traffic impacts analysis was incomplete and the Town Board's adoption of the negative declaration was pre-mature and should be annulled (Ps' Mem. of Law at 32).

Finally, with regard to the deficiency in the analysis of socio-economic impacts, Petitioners contend that they provided the Town "Board with the F&A Study on December 16, 2014 advising of the potentially devastating impacts BJ's GFS would have on existing GFSs" (Petition at ¶ 141), yet the negative declaration did not even mention the F&A Study (Ps' Mem. of Law at 34). According to Petitioners, the Mussa, Akram and Gill GFSs provide a living for over 20 families and they face displacement based on the cumulative impact of the Costco and BJ's Projects (*id.* at

[11]Petitioners contend that the SEQRA review was insufficient because the Town Respondents failed to take into consideration that if the BJ's GFS and the State Lands (240,000 square foot retail rather than a smaller residential development used) projects were approved, there would be a combined total of 2,042 new trips during the Peak PM Highway Hour and 2.602 new trips during the PM Saturday Hour. Petitioners' expert opined that the Sensitivity Analysis performed for the Town Board only analyzed the impacts of 694 new trips during the Peak PM Hour and 954 new trips during the Peak Saturday Hour (Maris Aff. at ¶¶ 8, 11 and Ps' Mem. of Law at 31). According to Maris, the Sensitivity Analysis shows that the intersection of US Route 202/NYS Route 35 and Taconic State Parkway Northbound ramps will operate at capacity during both the Peak PM Hour and the Peak Saturday Hour, and any additional traffic could exceed the intersection's capacity and create long delays (Maris Aff. at ¶ 9). Maris concludes by stating that to his knowledge, no analyses were performed to assess traffic conditions from the combined Costco, State Lands (involving at that time the proposed the 240,000 square foot retail development) and BJ's gas station development, and that a traffic study must be performed to assess the cumulative impacts associated with those two projects as well (Maris Aff. at ¶¶ 10, 12).

¶ 147).[12] In support of their position, Petitioners rely on the fact that "[t]he BJ's/Costco GFSs[13] are estimated to sell upwards of 22 million gallons of gasoline a year -- the equivalent of adding another 10 typically sized gasoline stations" (*id.* at ¶ 145). As such, Petitioners argue that "[i]ncreasing the gasoline market's annual 18 million dollar deficit by another 30-50 million dollars will result in displacement of small GFSs, loss of real estate values and increased unemployment" (*id.* at ¶ 146). According to the F&A Study, the closing of such stations would impact community character since it would cause "suburban blight with empty buildings, vacant pumps islands and infrastructure that cannot be retrofitted for any other use" (Ps' Mem. of Law at 36).

It is Petitioners' position that given that the CP policies 4-21, 4-42 and 5.2 "direct that the Staples Plaza be redeveloped into a village-center complete with work-force housing" but based on the Code, a GFS precludes the ability to include housing. As such, Petitioners argue that the Town Board was obligated to examine how the reduction in available housing by both the Costco and BJ's projects would impact the community's available housing needs (Ps' Mem. of Law at 33). According to Petitioners, its failure to do so necessitates the annulment of the Town Board's SEQRA findings (*id.*, *citing Land Maser. Montg I, LLC v Town of Montgomery,* 13 Misc 3d 870 [Sup Ct, Orange County 2006], *affd* 54 AD3d 408 [2d Dept 2008], *lv dismissed* 11 NY3d 864 [2008]). Petitioners further point to the Town Board's failure to address how this was a complete "reversal of its development policies expressed a year earlier in forcing the State Lands project to change its rezoning from C-3 to C-1 to avoid GFSs because they were an undesirable, too intensive use for the Rt. 202/35 corridor" (Ps' Mem. of Law at 35). Thus, Petitioners argue that the Town Board's failure to follow its promise in the CP of less intense (non-auto-centric) development in the BMT, its shift of the public improvement benefits to promote purely private gain, and its failure to address the socio-economic issues, necessitates the annulment of the SEQRA findings (*id.* at 35).

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[12] Petitioners rely on the Mussa, Akram and Gill affidavits in which they explain how the typical code-compliant GFS is not equipped to compete with the national retailers such as BJ's and the BJ's and Costco Projects will result in their closure (Ps' Mem. of Law at 34).

[13] It was estimated that the BJ's GFS would sell 4-5 million gallons of gasoline a year (Ps' Mem. of Law at 34).

In their Petition, Petitioners contend that BJ's GFS violates Code § 300-46 with regard to parking (503 provided where 535 required), signage (Code limits canopy signs to two sides where BJ's signage would be on three sides and combined signage of all signs exceeds maximum 60 aggregate by 500%), curb cuts/driveways (five provided where not more than two permitted and combined are 65 feet in width as opposed to 35 foot maximum permitted), separation of driveways (clustered together rather than being a minimum of 30 feet apart) (Petition at ¶¶ 98-109). Petitioners also contest the issuance of the SUP since Code § 300-46(A)(2) provides that a convenience store is permitted "within a gasoline filling station ..." and thus the GFS statute required the confinement of retail sales within a GFS's main building, but "Staples Plaza has an existing combined retail area exceeding 200,000 square feet -- more than 100 times larger than the typical GFS/ministore. Thus, the plaza's retail use is not confined *within the GFS*" (Petition at ¶ 93 [emphasis in original]; *see also* Ps' Mem. of Law at 12-13).

With regard to the impropriety of Respondents allowing BJ's to have a GFS as an accessory use, since the BJ's retail component is the principal use, Petitioners point out that the main uses permitted as of right in the C-3 District are the C-1 and C-2 uses, which include retail stores (Code § 300-21[C][12][a]) (Petition at ¶84). However, according to Petitioners, under Code § 300-21(C)(12)(b), in the C-3 Zoning District, there are eight permitted main uses (*i.e.*, drive-in theaters, motel or automobile courts or hotels, transportation terminals, exterior storage yards, GFSs [in accordance with the standards set forth in § 300-46], amusement centers [§ 300-77], automated car washes without GFS, and day care and nursery schools [§ 300-53]) (Petition at ¶84, n44). In addition, relying on Code Section 300-21(C)(12)(c)(1), Petitioners allege that "where a GFS is the 'main use,' large-scale retail is not among the six C-3 accessory uses"[14](*id.* at ¶ 89). Based on the foregoing, it is Petitioners' position that GFSs are not an accessory use and are only an **alternative** main use to the as of right main uses (*id.* at ¶ 86). Petitioners argue that

[14]The permitted accessory uses are (1) signs, (2) any accessory building or use incident to a permitted use, (3) off-street loading areas, (4) outdoor vending machines, (5) radio, television and other electronic transmission stations or towers, including wireless telecommunications facilities subject to an SUP, and (6) one accessory dwelling unit for owner, operator or janitor living quarters provided the unit is located in the main building.

based on well-established precedent, "[i]f a use does not fit within the Code's specific uses, it is prohibited" (Ps' Mem. of Law at 12).

Relying on the Code's definition of GFS, Petitioners argue that "(§300-2) proves that retail gasoline is an exclusive 'main use'" (Petition at ¶ 86) since it defines a GFS as:

> Any area of land, including structures thereon, or any building or part thereof that is used for the sale of gasoline or motor vehicle accessories and which may or may not include facilities for lubricating, washing or otherwise servicing motor vehicles, but not including body work, major repair or painting thereof by any means (Code § 300-2).

Petitioners also take issue with BJ's proposal which involves not only GFS pumps but also a small kiosk or attendant's booth (approximately 200 square feet), which is less than 500 square feet required by Yorktown Zoning Code Appendix B in the C-3 District (*id.* at ¶ 96). Finally, Petitioners assert that the issuance of the SUP was contrary to Section 300-36(B) which provides that "'[t]he ... [Applicant's] ... use will not hinder or discourage the appropriate development and use of adjacent land and buildings or impair the value thereof'" (Petition at ¶ 110, *quoting* Code § 300-36[b]). It is Petitioners' position that the Town Board violated this provision since BJ's GFS will devalue Akram's neighboring property. It is also contended that the Town Board ignored the impact on the 16 GFSs operating at an average 1.1 million dollar deficit (Petition at ¶¶ 113, 121). According to Petitioners, the Town Board was advised by Petitioners' expert, Centore, that "Costco's GFS would drain 25 to 30 million dollars from the IMA gasoline market with the closest 4 stations being hardest hit. As a result, the Town would suffer a displacement of small businesses, loss of real estate values and increased unemployment" (*id.* at ¶ 122). Petitioners contend that because the SUP is not in compliance with the provisions of the Code, pursuant to Code § 300-194(A), the SUP is null and void (*id.* at ¶ 126) and "[b]y allowing Staples Plaza to have a GFS, the Town Board has unlawfully merged § 300-46 with the definition of 'Regional Shopping Center' to increase a national retailer's regional draw and supply it with a powerful new sales weapon -- discount gasoline - in competing with its national rival Costco" (Ps' Mem. of Law at 14).[15]

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[15]According to Petitioners, Regional Shopping Centers require a minimum site of 35 acres. Furthermore, Petitioners point out that the zoning for Regional Shopping Centers does not permit GFSs (Ps' Mem. of Law at 11).

Relying on the affidavits of Mussa, Akram and Gill concerning the Town Board's unequal treatment of their GFSs and convenience stores as compared to the Town Board's treatment of BJ's application -- *i.e.*, their requests to have signage on their canopies and their requests to increase the square footage of their convenience stores to between 2500 and 3000 square feet were denied (*id.* at ¶¶ 149-178) -- Petitioners contend that the Town has given "[BJ's][16] an unfair business advantage which none of the neighboring Code compliant GFSs will be able to fairly compete against" and "[r]ezoning property and issuing a special use permit allowing the BJ's big box retailer to add a fueling station simply to compete against Costco's new GFS is the exact opposite of the land use models the Town committed to pursue in the SDS and CP" (*id.* at ¶¶ 173, 175).

For their First Cause of Action[17], Petitioners contend that the Town Respondents' actions violate Town Law § 272-a(11) because the determinations at issue were in contravention of the CP. Specifically, Petitioners contend that the rezoning of a portion of the Staples Plaza and the issuance of the SUP violated the CP by: (1) increasing the intensity of use when the CP provided that it would be reduced to 75% of pre-existing levels; (2) approving an auto-centric GFS and regional retail destination at the Staples Plaza in the Crompond Hamlet Business Center that the CP directed be redeveloped to a pedestrian-friendly, mixed use, village-style development with work-force housing; and (3) approving a GFS at the precise location which the SDS and CP specifically recommended to be reshaped to village center/hamlet style development with no GFS (*id.* at ¶ 182). Based on the foregoing, Petitioners contend that the Town Board exceeded its authority in rezoning the Staples Plaza property and granting the SUP.

For their Second Cause of Action, Petitioners allege that the rezoning at issue was illegal spot zoning as it only benefitted "a few out-of-state corporate entities to the detriment of the community and in violation of the policies and goals of the Town's CP and SDS" (*id.* at ¶ 191), lacked "the requisite public benefit and is contrary to 11 years of federal, state, regional, county

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[16]The Court assumes Petitioners' reference to Costco rather than BJ's was a typographical error.

[17]While Petitioners use the term "Claims for Relief", the Court shall refer to the claims as "Causes of Action," the terminology used in the CPLR.

and local planning efforts as detailed in the SDS and CP" (*id.* at ¶ 189).

For their Third Cause of Action, Petitioners contend that the Town Board's negative declaration just seven weeks following its lead agency designation should be annulled because: (1) the action should have been declared a Type I action due to its proximity to the parklands associated with the Bear Mountain Parkway; (2) the traffic counts were understated (Ps' Mem. of Law at 31-32); (3) there was no consideration of the impacts to the gasoline market sector despite SEQRA's requirement that socio-economic impacts be considered and the negative declaration incorrectly stated that the project was consistent with the CP since future work-force housing could not be developed on the site and no examination was undertaken as to the effect of the elimination of the Costco and BJ's sites for affordable housing (Ps' Mem. of Law at 33); (3) in contravention of 6 NYCRR § 617.7 (c)(iv),[18] as there was no consideration of the fact that "BJ's combination big box retail and fuel facility was fundamentally contrary to the CP or SDS and thus, the project should not have received approval" (Petition at ¶ 215); and (4) the Town Board failed to consider the significant impacts to water quality as presented by Dr. Iyler (*i.e.*, that the project's stormwater plans would not remove toxic components of gasoline) (*id.* at ¶218). As their relief, Petitioners request that the negative declaration and special use permit be annulled (*id.* at ¶220).

In their Fourth Cause of Action, Petitioners request that the rezoning of the portion of the Staples Plaza be annulled as arbitrary and capricious since "the Town Board abused its police powers by creating individual benefits to one property owner, and one neighboring tenant, in conflict with the Town's duly adopted zoning ordinances, the SDS, and the CP to the detriment of the community as a whole, and surrounding businesses who invested in reliance on the Town's requiring uniform compliance with the duly adopted plans" (Petition at ¶ 222).

For their Fifth Cause of Action, Petitioners reiterate their contention that the Town Board acted arbitrarily and capriciously and exceeded its lawful authority by issuing the SUP because it: (1) granted gross exceedances to the width and number of driveways and signage: (2) ignored the massing of retail operations by allowing box retail use to be combined with a GFS which was 100

[18] 6 NYCRR § 617.7(c)(iv) provides that "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" must be considered in determining the adverse impacts of an action."

times greater than the maximum retail granted to others; (3) ignored the accessory use limitations on retail at GFSs and instead created a new use of a GFS as an accessory use to a big box retail use; (4) ignored the requirement that in issuing a SUP, there should not be detrimental impacts on neighboring land values; and (5) ignored the requirement found in the Code, Appendix B that requires 500 feet for additional buildings in the C-3 District when it allowed the gasoline attendant booth to be placed in the location that it was (*id.* at ¶224-231).

As their Sixth Cause of Action, Petitioners contend that by granting the SUP, the Town Board exceeded its lawful authority by "ignor[ing] the fundamental structure of the zoning code, its special use permit criteria (including avoidance of impacts to neighboring land values), as well as unlawfully permitting non-accessory uses on the GFS site violating the plan language of §300-46 of the Code which only allows a 'convenience store' as an accessory use to GFSs and issued further concessions and approvals to BJ's and Costco allowing gross exceedances of the GFS ordinance, which authority was vested in the Town's Zoning Board of Appeals rather than the Town Board" (*id.* at ¶234).

In their Seventh Cause of Action, Petitioners contend that the disparate treatment the GFS Petitioners received as compared to BJ's with regard to the approval of gross exceedances of the scale, mass and use restrictions is a violation of their rights to due process and equal protection (Petition at ¶¶ 235-237). In addition, Petitioners contend that "in failing to consider the local housing needs of the community while rezoning and issuing a GFS SUP which eliminates the potential for work-force housing for the Staples Plaza, the Town acted in a discriminatory manner in violation of the laws of the State of New York and the state and federal Constitutions" (Petition at ¶ 238).

For their Eighth Cause of Action, Petitioners repeat all their prior assertions for why the Town Board's negative declaration and SUP issuance should be annulled and request that the Court annul the site plan approval issued by the Planning Board as premature, arbitrary and capricious, and an abuse of discretion (*id.* at ¶241).

In their Ninth Cause of Action, Petitioners request that this Court issue an injunction against any construction based on Petitioners' showing of a likelihood of success on the merits, the imminent threat of irreparable harm to the environment and community, and the balancing of

equities in favor of preserving the status quo and requiring equal enforcement of the laws.

In their Tenth Cause of Action, Petitioners seek an award of counsel fees and other expenses pursuant to CPLR 8600 *et seq.* (State Equal Access to Justice Act) (*id.* at ¶¶ 247-250).

On or about January 6, 2016, the Town Respondents and Respondents BJ's, Realty Income and UB Yorktown ("Applicant Respondents") moved to dismiss the plenary claim set forth in the Seventh Cause of Action for failure to state a claim upon which relief may be granted and the remaining claims based on Petitioners' lack of standing. The Town Respondents and Applicant Respondents also interposed their Answers, wherein they denied the material allegations of the Petition/Complaint and asserted various objections in point of law and defenses, including lack of standing, failure to exhaust administrative remedies, and statute of limitations.

C. Respondents' Contentions in Opposition to Petition and in Support of Motion to Dismiss

In opposition to Petitioners' Petition and in support of their motion to dismiss, Respondents submit: (1) their Answers; (2) the Certified Record;(3) an affirmation from Yorktown's then Town Attorney, Jeannette Koster, Esq. dated January 6, 2016 ("Koster Aff."), together with the exhibits annexed thereto; (4) an affidavit from Nelson Cabral,[19]sworn to December 30, 2015 ("Cabral Aff."); (5) an affidavit from Robert Aiello, P.E. (JMC Planning Engineering Landscape Architecture & Land Surveying, PLLC ["JMC"]), sworn to December 30, 2015 ("Aiello Aff."), together with the exhibits annexed thereto; (6) an affidavit from John G. Dzwonczyk, P.E., C.F.P.S. (JGD Associates, Inc. ["JGD"]) ("Dzwonczyk Aff."); (7) an affidavit from Richard J. Pearson, P.E., P.T.O.E. (JMC), sworn to December 30, 2015 ("Pearson Aff."), together with the exhibit annexed thereto; and (7) an opposition memorandum of law ("Rs' Opp. Mem.").

In opposition to Petitioners' Petition and in support of their motion to dismiss, Respondents raise a number of arguments.

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[19] Cabral is BJ's Manager of Site Development. The major purpose of his affidavit is to refute Petitioners' contentions that the only reason for BJ's proposal for a GFS was so that BJ's could compete against Costco's GFS proposal. According to Cabral, the primary reason for the proposal was that GFSs have become an amenity sought by members of discount clubs and BJ's has been undertaking the effort to have GFSs in all new clubs and to retrofit its existing clubs with this amenity nationwide (Affdavit of Nelson Cabral, sworn to December 28, 2016 at ¶ 11).

First, with regard to the GFS Petitioners' standing, Respondents argue that the only harm alleged involves purely economic injuries resulting from the increased competition from the BJ's GFS, and economic harm is not within the zone of interest protected by SEQRA or the Town's Zoning Code (Rs' Opp. Mem. at 14-18). With regard to the standing of Petitioners Scotto and YSG, Respondents argue that because the harm they allege to have suffered does not differ from the harm suffered by the public at large, Petitioners Scotto and YSG do not have standing. Respondents contend that because Scotto lives 1,226 feet from the nearest corner of the rezoned portion of the Shopping Center, 752 feet from the Shopping Center's closet property line, and 1,210 feet to the nearest point of the Project (the proposed restaurant pad), these distances are too far to permit Scotto to have the presumption of injury in fact based on proximity alone. Further, Respondents point out that Scotto has only alleged past harm to his property from the flooding from the development that has already taken place, and his affidavit fails to allege how the BJ's Project (as opposed to his assertions concerning the inapplicable Costco Project) would contribute to, or in any way exacerbate, the flooding conditions (Rs' Opp. Mem. at 19-20). Respondents argue that the concerns Scotto raises with regard to the underground tanks and gas spills mixing with the stormwater and polluting his backyard are entirely speculative, unsupported in the record and insufficient to confer standing (*id.* at 20-21). Finally, Respondents assert that Scotto's generalized concern over traffic impacts relate primarily to the Costco Project and, in any event, are "generalized allegations, relating to purported traffic impacts affecting a large area and vast portion of the public" and thus are insufficient to support Scotto's standing (*id.* at 22).

With regard to YSG's standing, Respondents assert that to establish standing for a community group, Petitioners must show that ": (1) 'one of more of its members would have standing to sue,' (2) 'the interests it asserts are germane to its purposes,' and (3) the litigation does not 'require[] the participation of its individual members'" (*id.* at 22, *quoting Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775 [1991]). According to Respondents, Petitioners cannot satisfy the first prong based on their arguments concerning Scotto's lack of standing.

Alternatively, Respondents assert that even if Scotto had standing, a review of the Nettelfield Aff. makes clear that YSG's grievance has to do with the Costco Project, not the BJ's Project, which simply involves the addition of a GFS on an already developed and established

Shopping Center (*id.* at 23). Respondents refute Nettelfield's opposition to the BJ's Project based on three key factors. The first factor identified -- the Costco Project and the GFS at the Shopping Center "'would ... have the effect of focusing retail away from the hamlets -- contrary to a key element of the Comp Plan"-- fails to explain how the BJ's GFS will detract from the vitality of an existing Shopping Center contrary to the CP's goals (*id., citing* Nettelfield Aff. at ¶ 13). With regard to the second factor -- putting a big box store in a greenfield site -- Respondents contend that this relates solely to the Costco Project and is irrelevant to the BJ's Project (*id.* at 24). Respondents further assert that the third factor, which involves Nettelfield's assertions concerning the watchdog purpose of YSG (*i.e.*, to protect and promote the public welfare embedded in the CD) and YSG's view that the Costco Project represents a bad return on investment for the Yorktown taxpayers, is again irrelevant to the BJ's Project (*id.* at 24). Alternatively, Respondents contend that the allegations concerning YSG's goal of enforcing the CP "rise to nothing more than 'generalized grievances,' which are no different from those suffered by the public at large" (*id.* at 24-25). Finally, according to Respondents, Nettelfield's argument that the Town Board felt compelled based on the Costco Project to grant BJ's rezoning petition so as to give BJ's a competitive advantage is not supported in the Record and in any event, "[t]he grant of a Zoning Map Amendment has no bearing on competitive advantage or disadvantage ... The sale volume that a gasoline station produces is the result of its pricing policies and level of customer service, both of which are dependent on the operator, and not zoning" (*id.*).

In the event that this Court were to determine one or more of the Petitioners have standing, Respondents assert that Petitioners' claims fail as a matter of law.

With regard to Petitioners' claim that the Town Board improperly granted the Applicant Respondents' application for a zoning map change, Respondents point out that all that was involved was a reclassification or line drawing whereby part of Lot 76 and all of Lot 75 were changed to a C-3 Zoning District. According to Respondents, given the presumption of constitutionality of a rezoning, Petitioners have a heavy burden (beyond a reasonable doubt) which cannot be satisfied "where, as here, 'zoning ordinance [or map change was] adopted for a legitimate governmental purpose and there is a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'" (*id.* at 25, *quoting Asian*

Americans for Equality v Koch, 72 NY2d 121, 132 [1988]). Further, with regard to the requirement that a rezoning be consistent with the CP, Respondents argue that the local officials' determination on this issue, given their familiarity with the local conditions, is entitled to deference and even if debatable, the decision should be sustained even in close cases where a court may have decided the matter differently (*id.* at 27). Respondents argue that "'"[a]bsent arbitrariness, it is for the locally selected and locally responsible officials to determine where the public interest in zoning lies"'" (*id.* at 27, *quoting Matter of Zaniewski v Zoning Bd. of Riverhead*, 64 AD3d 720, 722 [2d Dept 2009], *quoting Matter of Cowan v Kern*, 41 NY2d 591, 599 [1977]). Respondents dispute that the rezoning involved illegal spot zoning by pointing out that "[s]pot zoning occurs where there is a request to single[ ] out a small parcel of land for a use classification totally different from that of the surrounding area" and here, the "Zoning Map demonstrates that the parcel adjoining BJ's to the east is zoned C-3, and the parcel across the street from the Proposed Gasoline Station is also zoned C-3. The requested rezoning thus rationally creates a cohesive C-3 Zoning District" (*id.* at 31; *see also* Aiello Aff. at ¶ 49).

With regard to the rezoning's consistency with the CP, Respondents rely on the affidavit of Robert Aiello, Associate Principal of JMC, the Applicant Respondents' SEQRA consultant who was involved in obtaining the approvals at issue. In his affidavit, Aiello relies on the fact that the Shopping Center is located in the area of the CP and SDS known as the BMT, which the CP identified as one of the Town's Business Centers and "'major opportunity for economic development'" given its location directly across from the Taconic State Parkway and the Bear Mountain Parkway (Aiello Aff. at ¶ 54, *quoting* CP at ES-5, 4-1). Aiello also relies on the references in the CP concerning Yorktown being one of a few Westchester communities without a rail connection. From this, Aiello asserts that Yorktown residents rely on car transportation and are in need of gas stations (*id.* at ¶ 55). According to Aiello, BJ's GFS "would contribute to the continued economic viability of the existing Shopping Center and the important BMT commercial corridor" and, consistent with the CP, "encourage the development of retail uses 'with a regional draw'" (*id.* at ¶ 57, *citing* CP at ES-7). This continued economic vitality of the Shopping Center would, according to Aiello, make the BMT more attractive for the mix of uses sought by the CP, namely, "'senior housing, office and retail uses, and possibly a hotel or a country inn as well'" (*id.*

at ¶ 59, *quoting* CP at ES-5, 4-1 and 4-13).

Aiello contends that Petitioners have misquoted and misinterpreted the CP in support of their argument that the BJ's Project runs counter to its policies. In this regard, Aiello asserts that Petitioners' contention that the CP envisions the Shopping Center to be redeveloped as a hamlet-style, mixed-use design shopping center with limits on floor area (*i.e.*, small stores), possible second-floor apartments and professional offices in a pedestrian oriented format is actually referring to the "'north side of Route 202, adjoining the Taconic State Parkway'"; the Shopping Center is located on the south side of Route 202 and as identified in CP's Figure 4-2, the use of the Shopping Center is shown remaining unchanged (*id.* at ¶ 63). According to Aiello, "pursuant to Policy 4-21 (see id. at 4-13), although the Shopping Center is considered to be part of the BMT *Area*, the Shopping Center is not included in the Bear Mountain Overlay District in Figure 2-1. (See id. at 2-4)" (*id.* at ¶ 64). Based on the foregoing, Respondents assert that Petitioners' position that "the Shopping Center should cease operating as it exists today, and should be redeveloped as a hamlet-style, mixed use development" is not contained within the CP (Rs' Opp. Mem. at 33-34). Respondents further refute that the SDS envisioned doing away with the Shopping Center since a sketch in the SDS similar to the CP reflects that the vision was for the hamlet center on the north side and not the south side of Rt. 202 (*id.* at 35-36). Respondents further point out that the "sketch is captioned 'Sketches from residents at a public meeting during brainstorming session on topic of concern' ... This essentially back-of-the-napkin drawing does not purport to be a 'recommended development plan' as maintained by Petitioners" (*id.* at 37).

In response to Petitioners' contention that the decision to rezone Lot 75 and part of Lot 76 was a reversal of the Town's prior decision to deny C-3 Zoning to the State Lands project, Respondents assert that "[t]he State Land property is located west of the Shopping Center, and outside of, the BMT. (See Pearson Aff., ¶ 31). It is also located on the north side of Route 202/35. Petitioners provide no explanation as to how a determination relating specifically to a completely different property and location would have any bearing on the Project" (*id.*).

Respondents also dispute Petitioners' assertions that the proposed GFS is not a permitted use and is precluded as an impermissible accessory use to the BJ's wholesale club. In this regard, Respondents contend that a GFS is a main use permitted by SUP in the C-3 Zoning District and it

has never been their position that the BJ's GFS is an accessory use, nor was it approved as an accessory use. As further support, Respondents point out that the BJ's wholesale club and the GFS are on different lots and, therefore "by definition,[20] one use could not be accessory to the other in any event" (*id.* at ¶ 39). Respondents argue that even if there are other main uses on Lot 76, the Code "does not prohibit more than one main use on lots in the C-3 Zoning District" and pursuant to Code § 300-11(B), nonresidential districts are expressly excluded from the prohibition of multiple main uses (*id.* at 39). According to Respondents, this was confirmed by John A. Tegeder, Yorktown's Director of Planning on December 16, 2014 during the public hearing on the Costco Project wherein it was acknowledged that "it is the intent in the commercial districts to allow multiple main uses in the shopping center context, rather than having to subdivide the parcels for each individual use" and the "Town historically encourages multiple uses on lots in the commercial districts" (*id.*).

Finally, with regard to the propriety of the waivers from the SUP criteria, Respondents argue that Code § 300-46(Q) expressly states that the Town Board "'may for good cause shown, vary the requirements above, including sign limitations'" (*id.* at 39-40, *quoting* Code § 300-46[Q]). According to Respondents, the only two waivers that were necessary involved canopy height and signage and it is Respondents' position that given the circumstances (*i.e.*, for the height, the slope of the paved area, and for the signage, based on the size, layout and context of the existing Shopping Center) and the lack of any potential for adverse visual impacts, BJ's demonstrated good cause and the Town Board properly granted the waivers (*id.* at 40, *citing* Aiello Aff. at ¶¶ 77-78 and R 1176).

Respondents further address each SEQRA challenge mounted by Petitioners. With regard to the stormwater and water quality issues, Respondents summarize Petitioners' position as being that BJ's "'gasoline subsurface tank selling millions of gallons of gasoline a year with storm drains emptying directly into the Hunter Brook presents a potentially significant environmental impact from gasoline spills and untreated runoff'" (*id.* at 41). Respondents respond to this argument by

[20]According to Respondents, that is because the definition of an accessory use found within the Code § 300-3(B) is a "use which is customarily incidental and subordinate to the principal use of a lot ... and located on the same lot."

relying on the Aiello Aff., and the affidavit from their expert, Dzwoncyzk, showing that JMC prepared a SWPPP that mitigated any impacts from stormwater runoff and met or exceeded the requirements from (1) the New York City Department of Environmental Protection ("NYC DEP") Rules and Regulations for the Protection from Contamination, Degradation, and Pollution of the NYC Water Supply and its Sources, amended April 4, 2010; (2) the Code's Chapter 248 Stormwater Management and Erosion and Sediment Control; and (3) New York State's Stormwater Management Design Manual last revised August 2010 (the "Manual") (*id.* at 41, *citing* Aiello Aff. at ¶¶ 25, 26 and R 0249-84). According to Respondents, the post-development peak rate at each Drainage Area was found to decrease as compared to the existing peak runoff rate -- *i.e.*, for the one year storm it would decrease by 3.5%, for the ten-year storm, it would decrease by 8%, and for the 100 year storm, it would decrease by 11.7% (*id.* at 41-42, *citing* Aiello Aff. at ¶¶ 31-32). With regard to the protective measures proposed to protect against the accidental discharge of gasoline, Respondents assert that the SWPPP had the gasoline loading area and the customer filling area to be graded and piped so that runoff would be processed by an 8,000-gallon oil-water separator prior to its discharge from the site (*id.* at 42). Respondents also point out that in accordance with the Manual, all runoff from the site would be treated with a hydrodynamic separator to achieve the required removal of total suspended solids (*id.*). Based on the foregoing, it is Respondents' position that contrary to Petitioners' assertions, the BJ's Project would not exacerbate existing conditions. Further, to refute Petitioners' expert's position that the oil-water separator and the other stormwater protection measures would not remove certain dissolved contaminants (referred to as BTEX and chlorides), Respondents argue that it ignores "the significant measures that BJ's would undertake to prevent spills from occurring and potentially allowing such contaminants to enter stormwater runoff ... In fact, the Proposed Gasoline Station incorporates safety and pollution control measures that go far beyond what is required under applicable regulations" (*id.* at 43, *citing* Dzwoncyzk Aff. at ¶¶ 18, 20).

According to Respondents' expert, the BTEX are common leachates from road paving and are generated by such activities in far greater quantities than what could be generated from the GFS. Further, a municipality's salting activities to de-ice roadways involve much greater impervious surfaces than the BJ's Project. Thus, Respondents' expert opines that "to the extent that

BTEX and/or road salt could potentially be found in groundwater, Hunter Brook and surrounding properties, it unlikely to have originated from the Proposed Gasoline Station" (*id.* at 43, *citing* Dzwoncyzk Aff. at ¶ 23).

Respondents further address Petitioners' arguments that no hard look was taken with regard to the socio-economic impacts. First, to rebut Petitioners' contention that no hard look was taken at how the BJ's Project would negatively impact the potential for workforce housing opportunities, Respondents argue that whether the site was zoned C-1 or C-3, housing is expressly excluded as a permitted use under Code § 300-21(C)(8) and (12) and that even if the zoning permitted housing, "few people wish to live in a shopping center with a BJ's, Staples and Dunkin Donuts" (*id.* at 44). Respondents further reiterate their prior argument that nowhere in the CP is there a recommendation that the Shopping Center be redeveloped so that workforce housing could be incorporated (*id.*).[21]

In response to Petitioners' contention that the Town Board failed to take a hard look at the likelihood that the GFSs along this corridor would go out of business and that there would be blight from the inability to redevelop these vacant properties, Respondents rely on the evidence presented by Vince Ferrandino, AICP (Ferrandino & Associates, Inc.) in his affidavit (sworn to December 8, 2015), which was submitted in opposition to Petitioners' Petition in the Costco Action. In this regard, Respondents contend that Petitioners misconstrue Ferrandino's Retail Market Analysis ("RMA") when they argue that the BJ's and Costco Projects will cause an $18 million sales deficit since the Transportation and Auto Category does not simply involve gas sales, but it includes all sales and services by GFSs, including convenience store sales (*id.* at 46, *citing* Ferrandino Aff. at ¶ 8). Thus, according to Respondents, because BJ's proposed GFS will not have a convenience store nor will it provide the associated services that the other GFSs provide (*e.g.*, auto repair and oil changes) which Respondents contend are a major source of the other GFSs'

[21]In this regard, Respondents refute each CP Policy cited by Petitioners: "Policy 4-21 states only that the entire BMT should be a 'mixed-use center.' (Comprehensive Plan at 4-13). Policy 4-42 relates to an entirely different area of the Town, i.e., the Shrub Oak hamlet. (See id. at 4-23). Policy 5-2 relates to new development in the various business centers of the Town, including the BMT, and again stresses only that the entire area should be developed with a mix of uses. (See id. at 5-5)." (Rs' Opp. Mem. at 45).

income (*id, citing* R1199), and because the proposed BJ's GFS is only available to BJ's members, "Petitioners' conclusion that the Project would cause existing gas stations in Yorktown to go out of business is simply unsupported" (*id.* at 47). Respondents further argue that Petitioners cite to no evidence in the record when they assert that the existing GFSs that will go out of business cannot be retrofitted to another use and would, therefore, cause blight. Instead, it is Respondents' position, based on F&A's Community Character Assessment ("CCA"), that neither the Costco nor the BJ's Project would create blight and that there is no basis to find that even if GFSs went out of business, their properties could not be redeveloped for other uses (*id.* at 47 and n27).

Finally, Respondents reiterate their arguments rebutting Petitioners' contention that the BJ's Project runs counter to the SDS and CP. They further contend that "[i]t is ironic that the Gas Station Petitioners appear to be advocating for a less auto-centric community, while simultaneously challenging the Proposed Gasoline Station due to their fear that economic competition may put them out of business" (*id.* at 48, n28).

In response to Petitioners' contention that the Town Board did not take a hard look at traffic impacts, Respondents rely on the analysis performed by JMC (R0151-248) (the "Traffic Study") and argue that the Sensitivity Analysis volumes (which were a worst case scenario traffic situation with higher volumes) provided by Costco were incorporated into the Traffic Study. According to Respondents, the Traffic Study appropriately relied on the volumes at the BJ's in Brookfield, Connecticut since it has 14 filling stations (rather than the 12 proposed in the BJ's Project), and it is located near a Costco location. According to Respondents, the Traffic Study was conservative in that it did not credit the potential for BJ's members to have duel memberships with BJ's and Costco or the potential for defections to Costco. Moreover, it is Respondents' position that the Petitioners' consultant "provides no backup or empirical data to support" his purported estimate of 1,011 new trips during Peak PM Hour and 1,204 new trips during Peak Saturday Hour (*id.* at 50, *citing* Pearson Aff. at ¶ 22). According to Respondents, the Record reflects that the Town Board properly decided that the volumes set forth in the Sensitivity Analysis were reasonable and properly based on trip generation rates for Discount Clubs published by the Institute of Traffic Engineers ("ITE") and trip generation data from existing Costco stores. In support of the Traffic Study's reliance on Costco's DEIS for the No-Build scenario, Respondents concede that the data was from 2009, but

point out that it included an increase in traffic of 2% per year to 2013 (the year the Costco Project was supposed to be built). Likewise, Respondents contend that their Traffic Study "incorporated a general growth factor of 2% per year to project volumes to the year 2015, which was the anticipated build year of the BJ's ... Project" and therefore, Petitioners are incorrect that the Town Board underestimated traffic projections by relying on 2009 data (*id.* at 51).

It is Respondents' position that the Town Board also took a hard look at the mitigation for impacts to the Route 202 and Stoney Street Shopping Center Driveway under the Build and No Build scenarios based on the BJ's commitment to expend the necessary funds: (1) "to modify the signal timing and phasing at the Shopping Center Driveway"; (2) "to provide a separate left lane, a shared left/thru lane, and a separate right turn lane"; and (3) to "modify Stoney Street from the existing shared left/thru lane and separate right turn lane to two thru lanes with shared left and right turns" (*id.* at 51-52).

Respondents refute Petitioners' position that the requisite hard look was not taken based on the Town Board's failure to consider the cumulative traffic impact of the State Lands site since there was no project before the Board with regard to the State Lands site and the Town Board did consider the cumulative impacts of the Costco and BJ's Projects (*id.* at 52). According to Respondents, there is no legal authority for Petitioners' position that the Town Board should have analyzed the cumulative impact of an entirely conceptual and hypothetical project.

With regard to the alleged impropriety of classifying the action as "Unlisted" rather than "Type I" because of its proximity to parkland, Respondents argue that Petitioners' interpretation is incorrect because: (1) "[o]nly one corner of the Shopping Center is located diagonally across from parkland associated with the Bear Mountain Parkway -- at a distance of 82 feet to the closest property line of the Shopping Center" (*id.* at 55, *citing* Aiello Aff. at ¶ 19 and Ex. B thereto); and (2) "no portion of the Project is 'occurring' in that corner of the Shopping Center. At its closet, the parkland is 393 feet from the portion of the Shopping Center that is subject to the Zoning Amendment" (*id.* at 56).[22] Accordingly, Respondents contend that the Town Board appropriately

[22] Aiello also points out that the parkland is (1) 236 feet from the closest point of disturbance from the Project; (2) 393 feet from the closet point of rezoning; and (3) there is an existing gas station on the opposite side of Route 202/35 from the BMP, as well as existing commercial properties immediately abutting the east side of the BMP where it intersects with

classified it as an Unlisted Action since it is not in close enough proximity to have an impact.

In any event, even if it should have been a Type I rather than an Unlisted Action, Respondents contend that it was harmless error since a thorough EAF was prepared and an EIS is not always required in a Type I Action. It is Respondents' position that the Town Board properly determined that there was no potential for a significant adverse environmental impact that would necessitate the preparation of an EIS (*id.* at 56).

In support of the dismissal of Petitioners' Eighth Cause of Action seeking to annul the Planning Board's amended site plan approval as untimely, Respondents point out that the site plan approval occurred on May 4, 2015 (a month after this action was commenced on April 15, 2015), but Petitioners did not attempt to add this claim until November 10, 2015 -- six months after the approval. As such, Respondents contend that because such a challenge had to be asserted within 30 days after the filing of the decision (Town Law § 274-a[11]), even giving Petitioners the benefit of the fact that the Amended Site Plan may not have been filed until June 17, 2015, the Eighth Cause of Action must be dismissed on statute of limitations grounds since it was brought five months after the filing of the decision (*id.* at 58).

Respondents argue that GFS Petitioners' plenary claims concerning a violation of their equal protection and due process rights[23] must be dismissed since there is no due process interest in the issuance or denial of a discretionary permit and "Petitioners do not allege a property entitlement to the discretionary Special Use Permit approvals, much less one to which Petitioners have alleged a 'legitimate claim of entitlement'" (*id.* at 62). According to Respondents, the equal

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Route 202/35 (Aiello Aff. at ¶19). According to Aiello, even if it were a Type I action, it would make no difference "since the Project site consists of an existing commercial shopping center, and all proposed improvements are located within previously developed portions of the site currently used as a parking lot and a former septic system" (*id.* at ¶ 20). Aiello asserts that the Town Board did a complete review in the EAF Part 3 and proposed mitigation measures for the potential environmental impacts (*i.e.*, gas station operations, visual analysis, site lighting and traffic impacts) (*id.* at ¶ 21, *citing* R 76-560).

[23]The Court shall not delve into all the arguments concerning the dismissal of Petitioners' due process claim because, by failing to oppose this branch of Respondents' motion, Petitioners have conceded the insufficiency of this claim. Accordingly, this branch of Respondents' motion shall be granted.

protection claim fails as the GFS Petitioners have failed to allege that they are similarly situated to the proposed BJ's GFS, which is necessary for an equal protection claim (*id.* at 59-61). Moreover, Respondents further point out that Petitioners have failed to allege that there was an irrational basis for the Town Board to treat them differently. According to Respondents, there was such a rational basis since the proposed signage was to be located within the existing Shopping Center and there were different considerations to promote visibility.

With regard to Petitioners' request for injunctive relief in their Ninth Cause of Action, Respondents first contend that it is procedurally improper because CPLR 6311 requires that a request for a preliminary injunction be brought by motion or by order to show cause. Second, Respondents assert that Petitioners have not established their entitlement to an injunction since: (1) Petitioners have not established a likelihood of success on the merits; (2) Petitioners have not established irreparable injury since their claims of contamination are unfounded and they have not identified a harm that is irreparable, real, specific or imminent; (3) the equities tip in Respondents' favor as no irreparable injury would befall Petitioners whereas BJ's (and for that matter, the Town, with lost tax and permit fee revenues) will suffer injury through the delay of its Project (*id.* at 63-65). Respondents argue that in the unlikely event that this Court grants an injunction, a substantial bond would have to be set equal to, or in excess of, the cost of the Project (*id.* at 66).

Finally, because the Town is not a state agency for the purposes of CPLR Article 86, Respondents argue that there is no basis for this Court to award Petitioners their attorneys' fees and costs associated with this action.

D. Petitioners' Reply

In further support of their Petition, Petitioners submit a reply memorandum of law, a reply affidavit from Jonathan Nettelfield, sworn to February 20, 2016 ("Nettelfield Reply Aff."), a reply affidavit from Paul Moskowitz Ph.D., P.E., sworn to February 1, 2016 ("Moskowitz Reply Aff."); a reply affirmation from Petitioners' counsel, James Bacon, Esq. ("Bacon Reply Aff."); and a reply affidavit from Lawrence Centore, sworn to February 3, 2016 ("Centore Reply Aff.").

In his affidavit, Nettelfield explains that YSG recognizes that adding commercial development to the Staples Plaza is not necessarily against the provisions of the CP and that by

adding viable businesses to the Crompond Hamlet Business District ("CHBD"), it reinforces the hamlet's value to the community. Nettelfied explains the concern is that by putting a GFS in the middle of the Staples Plaza, it increases the likelihood of vehicular traffic and detracts from the ability to retrofit it to be more pedestrian-friendly as the CP envisioned. He contends that YSG is worried about the domino effect that the approval in this case will have on the Town Board's future giveaway to commercial interests along the Route 202/35 corridor.

The purpose of Moskowitz's affidavit is to echo the assertions made by Nettelfield with regard to how the approval of the BJ's Project was antithetical to the goals of the SDS and CP and a betrayal by the Town Board of the public trust. In this regard, Moskowitz explains how he is a founding member of YSG,[24] a member of the Town's Advisory Committee on Open Space, a member of the Town's CP Committee for three years. Moskowitz avers that he participated in the meetings for three years leading up to the adoption of the SDS and the follow up meetings with the Department of Transportation with regard to the improvements to be made to Rt. 202/35 based on the SDS and CP. Moskowitz also attaches the Introduction of the SDS as Exhibit B to his affidavit (Moskowitz Reply Aff. at ¶¶ 2, 6, 7). According to Moskowitz, the CP sought to promote mixed-use hamlet development and stated that the "Staples Plaza was to be reshaped to '[a]void repeating Route 6 development patterns on Route 202/35'" (*id.* at ¶ 12) and rather than increasing vehicular traffic to the Staples Plaza, "the Staples Plaza was to be a complimentary component of a mix of uses integrating bicycle and pedestrian trails along Rt. 202/35 linking the Bear Mountain Parkway with other parklands such as the Sylvan Lake Preserve" (*id.* at ¶ 14). Moskowitz emphasizes that it was the commitment to reducing development density and promoting low traffic generating uses along the Rt.202/35 corridor by Yorktown and the surrounding communities making up the SDS area, that was the lynchpin to the receipt of the $12 million in public funds to create additional capacity on it. Moskowitz disagrees with Respondents' consultant's (Aiello) contention that the SDS's policies have been effectively rejected by the other municipalities by their failure to follow them. Moskowitz further rejects Aiello's position that the hamlet center was only supposed to be

[24] In response to the Respondents' answer questioning YSG's status, Moskowitz explains that it is a 501(c)(3) organization which has authorized participation in this action as a petitioner and he attaches as exhibits (1) YSG's Corporate Filing Statement, (2) IRS tax exempt letter, (3) Constitution and (4) By-Laws (Moskowitz Aff. at ¶¶ 30-31 and Ex. D thereto).

on the north side of Rt. 202/35 as being too narrow an interpretation. Thus, according to Moskowitz, at the meetings he attended, it was discussed that the Staples Plaza was to remain "primarily a shopping center with potentially an overlay allowing second story housing thus encouraging a new growth pattern and reshaping the plaza as a part of the new hamlet center. You cannot have a 'main street shopping spine' (Petition ¶46) with only one side of the street" (*id.* at ¶ 21).

Finally, in response to a letter written by Albert A. Capellini, Esq. (Costco's counsel) (attached as Ex. C), wherein Capellini states that the store component of the Costco project was permitted in the C-3 Zoning District as a main use and the GFS component was also permitted as a main use based on his reliance on other examples along Rt. 202/35 where multiple main uses occupy the same lot, Moskowitz states that there are only two such examples involving day care facilities that are not comparable to an auto intensive GFS (*id.* at ¶ 28). In conclusion, Moskowitz requests that the Court hold "the Town to the adopted policies outlined in the SDS and CP which never envisioned allowing a big box retailer to add gasoline sales as an amenity for its members-only customers at the expense of redeveloping the hamlet district as a livable community that can co-exist with commuters from the three municipalities, and exist within the redeveloped infrastructure. The bait and switch is the antithesis of advancing the public welfare by following a reasoned well-considered plan such as Yorktown's existing Comprehensive Plan" (*id.* at ¶ 33).

In his affidavit, Centore states that he is the President of Systems Business Consulting, "a firm specializing in oil and gasoline market research and provided studies, reports and analysis of market trends and supply and demand in the gasoline industry for gasoline distributors throughout the tri-state area" (Affidavit of Lawrence Centore, sworn to February 3, 2016 at ¶ 1). Centore explains that there is a 21 minute gap in the recording of the Town Board's hearing held on December 16, 2014, which is when he spoke on behalf of the Yorktown GFS owners/operators, and he attaches as Exhibit A to his affidavit the transcript of his testimony (*id.* at ¶¶ 2, 5). He explains how based on the $18 million transportation deficit identified in the F&A Report, the Applicant's consultant failed to address how that deficit would impact the GFSs along the Route 202/35 corridor. According to Centore, because the area is already over-saturated with GFSs (16 in the Inner Market Area), there is no room for more stations as there is only so much business to go

around (*id.* at ¶ 19). Centore addresses Ferrandino's affidavit submitted on behalf of Respondents wherein Ferrandino attempts to soften the impact of the $18 million dollar deficit by claiming that the $18 million deficit applies to all convenience store sales and services at the GFSs, by pointing out that some GFSs do not have convenience stores and for the GFSs that have convenience stores, 50% of their profits emanate from gasoline sales (*id.* at ¶¶ 9, 24). Since the Costco GFS was expected to sell 10 million gallons of gasoline annually and the BJ's GFS was expected to sell 5 million gallons annually, Centore asserts that the 16 GFSs total annual sales volume of 19.2 million gallons may be reduced to just 4.2 million gallons a year, which "would eliminate the total annual gasoline sales for 12 of the existing IMA GFSs" (*id.* at ¶ 8). In response to Ferrandino's assessment that while many other retail establishments will be affected, it is only the anchor stores that are important enough when analyzing effect on community character, Centore states that, while in the strip malls a retail shop can go out of business and get replaced by another store "in the GFS/convenience store sector, these locations are, not just by definition but by actuality, a special use" (*id.* at ¶ 26). Finally, Centore includes pictures of eight commercial uses along the Route 202/35 corridor that are now vacant buildings falling into disuse and causing blight. It is his position that because the GFSs cannot be easily adapted to another use, if the Project goes forward, "the GFSs along Rt. 202/35 -- the Mobil, Gulf, Shell and Hess stations -- will be hardest hit. This will increase the already creeping suburban blight along Rt. 202/35 and will result in a loss of jobs, tax revenue and diminished quality of life for the residents exposed to these eyesores" (*id.* at ¶ 33).

In his reply affirmation, Petitioners' counsel, James Bacon, Esq. provides the second page of a letter from the New York City DEP dated October 2, 2014 which was missing from the Record (Reply Affirmation of James Bacon, Esq. dated February 5, 2016 at ¶ 1). Bacon attaches the letter as Exhibit A. He asserts that also missing from the Record are 21 minutes of comments from the only public hearing on the Project (*id.* at 1, n1). According to counsel, Petitioners are unaware of the extent of missing testimony, but the Centore Reply Aff. provides what they know was missing from the comments he made during that missing 21 minute interval (*id.*).

Bacon quotes from the missing page in the DEP's October 2, 2014 letter; in particular, the DEP's directive that the project sponsor address all physical changes to the site -- *i.e.*, "the location of all components of the existing stormwater management system (pipes, catch basins, practices

for treatment and attenuation of stormwater) that may be impacted by the action should be identified" and "potential impacts to water quality associated with the operation of the gasoline station should be discussed, and appropriate mitigations should be demonstrated as part of the SEQRA review"(*id.* at ¶ 2). Bacon refers to the arguments made in Petitioners' memorandum of law concerning Yorktown's obligations to reduce phosphorus loads from making their way to the New Croton Reservoir (including the installation of stormwater retrofits to reduce phosphorus), which includes the Hunter Brook, since it is a tributary to the New Croton. In further support, Bacon references materials *dehors* the record (*e.g.*, Watershed Inspector General's 2014 Annual Report and a Trout Unlimited report), which the Court has disregarded. The last part of the Bacon Reply Aff. has to do with his hearsay conversations with officials from the other municipalities involved in the SDS to counter Respondents' contention that the other municipalities (Cortlandt and Peekskill) failed to comply with it and that it is no longer relevant. Again, because such conversations are *dehors* the Record, they have not been considered by the Court.

In their reply memorandum of law, Petitioners respond to the branch of Respondents' motion seeking to dismiss the Petition based on Petitioners lack of standing.

In support of GFS Petitioners' standing, Petitioners first argue that because they are contending that the Town Board acted in excess of their lawful authority, all they have to show is that the administrative action will have a harmful effect on them and that the interest they are asserting is within the zone of interest to be protected by the statute -- *i.e.*, that the Town Board exceeded its lawful authority by: (1) rezoning the Staples Plaza to C-3 in conflict with the SDS and CP; (2) granting the SUP, which was not authorized under the Code; and (3) adopting a negative declaration for the rezoning and issuance of the GFS SUP (Ps' Reply at 10-11). According to Petitioners, "every petitioner has a very real stake in preventing the Town's abandonment of the SDS and CP development goals for the CHBD" (*id.* at 15).

In this regard, Petitioners argue that "because YSG was formed for the express purpose of serving as a watchdog regarding the implementation of the CP's policies, its interests are within the zone of interests covered by the CP and zoning code and it has standing to participate in this action" (*id.* at 18). According to Petitioners, YSG also satisfies its organizational standing based on the standing of one of its members, Vincent Scotto.

With regard to Scotto (whose property abuts the Hunter Brook), Petitioners rely on the impact he will experience based on his contention that BJ's is "not mitigating the pollutant discharges from the BJ's site which wind up in his flooded basement immediately downstream" (*id.* at 18). In support, Petitioners assert that Respondents' expert, John G. Dzwonecyzk, conceded that dissolved contaminants would not be prevented from entering the Hunter Brook. According to Petitioners, Dzwoncyzk instead argues that contamination arising from dissolved contaminants (BTEX) would be *de minimus* and would not constitute a significant adverse impact but this fails to address the phosphorous loadings (*id.* at 20, n.14). Petitioners also rely on the threat of petroleum spills that are real and, according to Petitioners' expert, Dr. Iyer, frequently occur at gasoline stations (*id.* at 21). Further, while Scotto's property is 752 feet from the Project, Scotto avers that the "'BJ's storm drain goes directly into the Hunter Brook just upstream from [his] house and [he doesn't] want BJ's gasoline spills mixing with its stormwater and discharging onto [his] property'" (*id.* at 22, *quoting* Scotto Aff. at ¶ 8).

Petitioners further contend that Scotto has standing based on the traffic congestion (a recognized SEQRA harm) that will impact his ingress and egress from his property to Rt. 202/35 (*id.* at 22). In support, Petitioners rely on *Matter of Napolitano v Town Bd. of Southeast* (2014 NY Slip Op 25441 [Sup Ct, Putnam County 2015]),[25] wherein even though the petitioners lived 2,208 and 4,233 feet from the rezoned property, respectively, they were found to have standing based on increased traffic and visual concerns.

With regard to the standing of the GFS Petitioners (Quick Stop and YSG), Petitioners argue that their zone of interests include their concern that the Town did not follow the CP and Code § 300-46, which was enforced against Mussa's Mobil in the CHBD east of Staples Plaza when he was restricted to a 1,500 square-foot convenience store rather than the 3,000 feet he had requested (*id.* at 26). Similarly, Akram testified that it was only after Section 300-46 was adopted that he purchased the Gulf station in the CHBD only 250 feet west of the Staples Plaza and that he would not have purchased the station if he had known that it would not be enforced. Petitioners argue that

[25]According to Petitioners, not only does Scotto live in closer proximity to the project as compared to the petitioners in *Napolitano*, in addition, unlike Scotto, no *Napolitano* petitioner alleged direct property harm from pollutants flooding on their property (Ps' Reply at 23).

simply because the GFS Petitioners also have an economic interest in not having the BJ's GFS, that does not disqualify them as petitioners (*id.* at 27). Petitioners also point out that the Town Board credited BJ's argument that it would be economically disadvantaged if the Town Board did not rezone,[26] yet completely ignored and failed to investigate the GFS Petitioners' claim concerning the socio-economic impacts the BJ's project would have on the continued viability of their businesses (*id.* at 28-30). According to Petitioners, the potential displacement of the Gulf and Mobil stations falls within SEQRA's zone of interests (*id.* at 31).

Finally, Petitioners argue that "all petitioners have alleged a legally cognizable interest tied to the zone of interest the CP and zoning code are designed to protect, and because they challenge a municipality legislating a benefit and committing public resources to a private entity in exceedance of their authority, the laws of standing should not [be] used to shield that unlawful governmental activity from judicial review" (*id.* at 32).

Petitioners reiterate their arguments for why the rezoning of the portion of the Staples Plaza to a C-3 zone and then the allowance of a GFS next to a big box retailer are antithetical to the CP and SDS, which sought to encourage mixed-use hamlet-style development that was pedestrian and bicycle friendly so as to create a cohesive CHBD in the BMT and discourage auto-oriented uses that attract heavy traffic. In this regard, Petitioners contend that the CP specifically states that the purpose of the C-3 district is "'excluding auto-oriented uses that attract heavy volumes of traffic'" (Ps' Reply Mem. at 40, *citing* CP Table 2-11 at 2-17), which is why the State Lands project was denied C-3 zoning to prohibit further gas stations in the CHBD, just 600 feet west of the Staples Plaza (*id.* at 40). Petitioners also point out that in denying the State Lands' rezoning to a C-3 Zoning District, the Planning Board voiced that one of the reasons for the denial was that it was contrary to the pedestrian-friendly, mixed-use, hamlet-style development envisioned in the SDS (*id.* at 42). According to Petitioners, because the zoning change is not in conformance with the CP, it violates Town Law § 272-a(11) and no deference should be afforded to it (*id.* at 33). Petitioners

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26 In response to Respondents' contention that the GFS sought was not to put BJ's on a level playing field with Costco, Petitioners rely on a BJ's representative's statement at the public hearing that "one of the reasons that all his tenants in the Staples Plaza signed off and endorsed this, is they believe that this is critical to the economic vitality, particularly if the Costco comes in up the street" (Ps' Reply Mem. at 33-34, n 48, *citing* R 1058).

further assert that Respondents "do not and cannot argue that the rezoning is a public benefit" since "[t]he economic benefit to one shopping center (which showed no signs of economic distress) is, as a matter of law, not a public benefit" (*id.* at 38). According to Petitioners, there is nothing in the record to support the notion that rezoning will protect the economic vitality of the Staples Plaza since there is nothing to indicate that it was threatened with tenant loss or blight (*id.* at 39).

Respondents reiterate their arguments for why this is not a permitted use under the Code (*i.e.*, it is a new accessory use[27] not contemplated by § 300-46 or the CP) and therefore, prohibited as a matter of law (Ps' Reply Mem. at 3-4).

Petitioners argue that the Town Board exceeded its authority (CPLR 7803[1] and [2]) in its interpretation of Code § 300-46 based upon: (1) the express definitions in the Code; (2) the GFS statute's legislative history;[28] and (3) the Town's previous enforcement of Section 300-46 limiting the retail component on a GFS (*id.* at 36). With regard to the express definitions, Petitioners argue that Section 300-46 limits retail on a GFS to a convenience store and Section 300-3 defines a GFS as "[a]ny area of land, including structures thereon, or any building or part thereof that is used for the sale of gasoline or motor vehicle accessories and which may or may not include facilities for lubricating, washing or otherwise servicing motor vehicles, but not including body work, major repair or painting thereof by any means" (Code § 300-3). Based on this, Petitioners contend that the "definition covers all lands and buildings *used for the sale of gasoline or motor vehicle accessories*. The definition is not limited to the tax lot upon which the BJ's GFS is sited" (*id.* at 43). It is Petitioners' position that Respondents' failure to address this definition is "a tacit

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[27]Petitioners request that the Court disregard Respondents' assertions that the GFS is not an accessory use as defined by the Code since BJ's defines the gasoline sales an amenity to be offered to its members and by "definition and practice an accessory to its principle [*sic*] wholesale retail use" (Ps' Reply Mem. at 5).

[28]In support of their contention that the legislative history does not support Respondents' position, Petitioners rely on the fact that during the discussions leading up to the enactment of Section 300-46, Board members questioned the need for convenience stores and argued against allowing car washes or car leasing businesses so as to avoid additional traffic. It was at that time that Supervisor Elliot argued that the convenience stores presented no additional traffic concerns since it would only be the customers getting gas who would be using the convenience store (Ps' Reply at 41).

admission that the proposed use is not contemplated by § 300-3 nor § 300-46 nor any provision of the Town Code nor is it mentioned as a potential use in the Comprehensive Plan" and "a use not contemplated by the Code is prohibited" (*id.* at 43).

Relying on the Code's definition of a Lot as "[a] parcel of land, not divided by streets, occupied or to be occupied by a building and its accessory buildings or by a dwelling group and its accessory buildings, together with such open spaces as are required under the provisions of this chapter, and having its principal frontage on a street, " Petitioners contend that "[t]here is no limiting the definition of 'lot' to a single tax parcel or zoning a portion of a lot to allow a different use on a portion of a lot. A lot is defined instead by the principle [*sic*] use of the land and its accessory buildings. Thus, although the Staples Plaza consists of many large retail buildings and two tax lots, the principal use of the tax lot is large scale retail" (*id.* at 51). Petitioners further point out that under Code § 300-9, "[e]ven where a lot spans two districts, the less restricted portion does not extend to the entire lot" (*id.* at 51, n64). Based on the foregoing, Petitioners assert that the "BJ's store, which also houses a Tire Center, and its GFS are situated on the same lot, which shares the same footage, the same ingress and egress, the same curb cuts and are operated by the same company offering BJ's brand of and gasoline. BJ's GFS and the other retail stores in the Plaza are shown as one integrated project shown on a single site plan" (*id.*). Petitioners find fault with the SUP resolution that claims the GFS lot is restricted to Tax Lot 76 since it ignores Aiello's position that the GFS is just an extension of the amenities provided to BJ's members. Further, it is Petitioners' contention that

> the resolution further avoids the definition of a GFS by stating that the BJ's GFS lot exceeds the minimum lot size for GFSs, lot frontage and depth requirements ... Thus, on one hand, for the purpose of meeting §300-46 lot area requirements, respondents claim that Tax Lot 76 is the GFS lot. Then, in order to evade §300-46's limitations on GFS retail to a convenience store, respondents argue that the entirety of Lot 76 should not be governed by §300-46. Hence, respondents have invented a new definition of "lot" unique to BJ's GFS. "Gasoline Filling Station" is redefined from "[a]ny area of land, including structures thereon, or any building or part thereof that is used for the sale of gasoline or motor vehicle accessories" to "that portion of a tax lot only used to dispense gasoline with the caveat that the entire tax lot may be used to meet 300-36's lot frontage and area requirements (*id.* at 52, *citing* Ps' Ex. 2).

Petitioners further argue "the definition of GFS extends to *any area of land, including structures thereon* used for the sale of gasoline OR 'motor vehicle accessories' removes any doubt that BJ's wholesale store --- located on the same site -- is subject to 300-46 because the BJ's store includes a Tire Center" (*id.* at 53).

According to Petitioners, "[t]he resolution's failure to address why the GFS definition may be restricted to the gasoline dispensary portion of a lot is fatal" (*id.* at 53).

Petitioners rebut Respondents' contention that multiple main uses on the same lot are permitted by arguing (1) the only example from the Costco case was where a day care facility was permitted in a shopping center and "unlike the Code's definition of GFS, the definition of day care facilities is not an exclusive use to the entire lot" whereas "the Code's definition of a GFS expressly encompasses all lands and buildings throughout the lot selling gasoline or 'motor vehicle accessories'" and day care facilities (as compared to GFSs) are a use that the Town wishes to promote; and (2) while the definition of Regional Shopping Center allows for a number of primary uses, notably absent are GFSs. Petitioners also rely on the legislative history[29]and the Code which refer to GFSs as a main use and "§300-46 does not envision a GFS as an accessory use amenity to a members-only retail club" (*id.* at 56).

Petitioners contend that because the Town Board "acted in an administrative capacity in issuing a SUP ... [it] cannot engage in back-door rezoning by simply waiving all the requirements of 300-46" (*id.* at 57). According to Petitioners, the Town Board, by issuing the waivers to

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[29]According to Petitioners, the legislative history supports that GFSs were intended to be the main uses, otherwise Ms. Roma's gas station would have been a conforming accessory use to the Roma building (Ps' Reply Mem. at 56). In support, Petitioners provide the discussion contained in the Town Board minutes from 1991 concerning the adoption of Section 300-46 (Ps' Ex. 4) wherein the major concerns voiced were the uses to be allowed at the GFSs to avoid traffic and that all gas stations be subject to the same set of rules (Ps' Reply Mem. at 24). In this regard, Petitioners rely on an exchange between Ms. Grace Roma and Yorktown Planning Director Naomi Tor wherein there was an acknowledgment that the new ordinance would not render Ms. Roma's combination GFS and office/retail building conforming because the new statute would not allow GFS as accessory uses and "Planning Director Tor confirmed a multiple use GFS lot is a non-conforming use" (*id.* at 25). Because the Court understands that the Roma property was located in C-2 Zoning District, it would appear that the Roma non-conforming use is a red herring in terms of whether or not two or more main uses, which include a GFS as one of the main uses, are permitted in a C-3 Zoning District.

accommodate an interior gas station site, was, in actuality, approving a new use, which was a legislative and not administrative function (*id.*). Finally, Petitioners repeat their position that "there is nothing in the CP nor the general or individual standards for SUPs as provided in 300-36, 300-37 or 300-46, nor the legislative history for 300-46 that supports merging the Code's definition of a 'Regional Shopping Center' with the definition of a GFS to create a new use" (*id.* at 58). Petitioners reiterate their position that by putting a GFS in the Staples Plaza, "the expansion of residential uses in the CBHD is curtailed as: '[t]here shall be no residence or sleeping quarters maintained in a gasoline filling station' §300-46(A)(4)" (*id.* at 58).

According to Petitioners, the Town Board's resolution approving the SUP is also deficient and no deference should be afforded to it because the Board failed to consider, as it was duty bound to do, in accordance with Code § 300-46, the fiscal and socio-economic impacts. In this regard, Petitioners rely on the fact that there is no mention of the Retail Market Analysis submitted by Petitioners regarding how the $18 million deficit had the potential to shut down the Gulf station to the west and cause blight to spread in the CHBD (*id.* at 59-60).

In further support of the Town Board's alleged failure to take the requisite hard look under SEQRA, Petitioners repeat many of the same arguments set forth in their Petition and Memorandum of Law. Petitioners again focus on the fact that the BJ's SWPPP failed to include a phosphorous loading analysis and how the enhanced phosphorous removal would be achieved (*id.* at 65, Petition ¶137 and Ps' Ex. 18 at ¶ 8). According to Petitioners, Respondents never addressed Dr. Iyer's comments in the negative declaration and "Respondents never identified the discharge point or reported on quality of the receiving waters" (*id.* at 65, *citing* R1070). Further, Petitioners assert that the Town Board cannot address water quality issues in this proceeding nor could it defer review of the phosphorous loadings and impacts to state water quality standards to DEP and/or any bilateral negotiations between DEP and the applicant. According to Petitioners, the Town Board was on notice that any "discharge that causing changes in PH, reductions in DO and increases in nutrient levels and temperature to a trout stream are prohibited" (*id.* at 66, *citing* 6 NYCRR §§ 703-704).

Petitioners further contend that the SEQRA analysis was deficient since the Town Board failed to consider "whether the action creates 'a material conflict with a community's current plans

or goals as officially approved or adopted'" and here, departing from the CP, SDS and zoning code to approve this new use of selling gasoline as an amenity for a members-only wholesale club, "was a significant adverse environmental impact requiring a positive declaration and examination in an EIS" (*id.* at 66-67).

Petitioners also argue that the Court should not consider a new assertion propounded by Vincent Ferrandino, which was not raised in the record of the SEQRA review, which is that as long as a commercial enterprise does not have a significant nexus to the Town's community character in that it would increase the potential for blight and other community impacts, it need not be reviewed under SEQRA (*id.* at 60). According to Petitioners, based on relevant case law, "the potential displacement of a number of small businesses that make up a community is an impact that must be considered ...." (*id.* at 69).

In further support of their Equal Protection claim, Petitioners dispute Respondents' position that parties must be identical. Instead, it is Petitioners' position that "in applying §300-46's limitations on GFS retail, Mussa's GFS and BJ's are 'similarly situated in all material aspects'" and the GFS requirements must be applied equally to all sites in the C-3 District (*id.* at 73).

Finally, Petitioners contend that because Petitioners originally requested injunctive relief with their initial motion and revised notice following the grant of severance, they have complied with what is required to place Respondents "on notice that proceeding with any site improvements is done so at their own risk and any later petitioners' claims for injunctive relief cannot be mooted" (*id.* at 76).

D. Respondents' Reply

In further support of their motion, Respondents submit a reply affirmation from their counsel, David S. Steinmetz, Esq.

In his affirmation, Steinmetz notes that Petitioners' Reply Memorandum which is 77 pages in length exceeds the Environmental Claims Part rules by 47 pages. Counsel takes issue with the amount of references in Petitioners' Reply to the Costco Project, which, because it was severed from this action given the separateness of the two projects, should be irrelevant to this proceeding. Steinmetz further identifies the exhibits and statements made by Bacon in his reply affidavit which

are *dehors* the record and should not be considered by the Court in rendering its determination, *i.e.*, (1) the East of Hudson Watershed Corp. 2014 Annual report dated May 12, 2015 (5 months after the approvals) attached to the Bacon Reply Aff., Ex. B; (2) the Comments of the Watershed Inspector General with regard to the Costco DEIS attached to Bacon Reply Aff., Ex. C; (3) the letter dated May 23, 2013 from NYC DEP regarding the Costco Project attached to Bacon Reply Aff., Ex. D; (4) the letter dated December 17, 2012 from the Croton Watershed Chapter of Trout United to Town Planning Board relating to the Costco Project; and (5) Bacon's summaries of hearsay conversations he had with the officials in Cortlandt and Peekskill regarding the Towns' adherence to the SDS, which occurred after the approvals in this action. Respondents further contend that Bacon's reference to the Board Minutes of the public hearing on May 7, 1991 concerning the Roma building has no relevance to this action.

LEGAL DISCUSSION

PETITIONERS' STANDING

Because standing is an essential ingredient to the viability of this proceeding, the Court will first address this branch of Respondents' motion to dismiss.

"The burden of establishing standing to raise [a SEQRA claim] is on the party seeking review" (*Society of Plastics Indus., Inc., supra*, 77 NY2d at 769; *Citizen's for St. Patrick's v City of Watervliet City Council*, 126 AD3d 1159 [3d Dept 2015]). However, "[i]n determining motions to dismiss based on lack of standing, the Court accepts the allegations of the verified petition and petitioner's affidavits as true" (*Rhodes v Herz*, 84 AD3d 1, n1 [1st Dept 2011], *lv dismissed* 18 NY3d 838 [2011]).

To establish standing with regard to a zoning violation, a petitioner must allege that he/she/it suffered injury in fact within the zone of interest for which the zoning ordinance at issue was envisioned to protect (*Matter of Harris v Town Bd. of Town of Riverhead*, 73 AD3d 922 [2d Dept 2010], *lv denied* 15 NY3d 709 [2010]). In this regard, the standard for standing set forth in the Court of Appeals' decision in *Matter of Sun-Brite Car Wash, Inc. v Board of Zoning Appeals of Town of North Hempstead* (69 NY2d 406 [1987]) is applicable to Petitioners' claim that the Town

Board's rezoning of Tax Lot 75 and part of Tax Lot 76 violated Town Law § 272-a(11) because it was contrary to the CP, which is that

> [a] property holder in nearby proximity to premises that are the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damage, because adverse effect or aggrievement can be inferred from the proximity (*Matter of Sun-Brite Car Wash, supra* 69 NY2d at 409-410).

For SEQRA standing, a petitioner must show: (1) injury in fact – *i.e.*, that petitioner would suffer direct harm, injury that is in some way different in kind or degree from that of the public at large; and (2) that the interest or injury asserted falls within the zone of interest sought to be protected or promoted by the statute under which the governmental action was taken (*Society of Plastics, supra*, 77 NY2d at 772; *Matter of Turner v County of Erie*, 136 AD3d 1297 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]; *Matter of Blue Lawn, Inc. v County of Westchester*, 293 AD2d 532, 533 [2d Dept 2002], *lv denied* 98 NY2d 607 [2002]; *Long Is. Pine Barrens Society v Planning Bd. of Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995]).

There is a presumption of standing to raise a challenge under SEQRA where the issue involves a rezoning and the petitioner resides in close proximity to the area rezoned. Thus, "a nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity ... The proximity alone permits an inference that the challenger possesses an interest different from other members of the community" (*Matter of Gernatt Asphalt Prod., Inc. v Town of Sardinia*, 87 NY2d 668, 687 [1996]; *see also Matter of Center Square Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 9 AD3d 651 [3d Dept 2004] [association whose members had homes that abutted or were within several homes of property given use variances had standing without the need to show individualized harm]; (*Matter of Shapiro v Town of Ramapo Town Bd.*, 98 AD3d 675 [2d Dept 2012], *lv dismissed* 20 NY3d 994 [2013] [petitioners who lived across the street from project did not have to show actual injury or special damage to establish standing]; *Citizens for St. Patrick's*, 126 AD3d at 1159 [residence located across the street will suffer direct harm different from the general public even without allegations of individual harm]; *Matter of Youngewirth v Town of Ramapo*, 98 AD3d 678 [2d Dept 2012] [petitioner who lived in close proximity to proposed site did not need to show actual injury or special damages]; *Matter of King v County of Monroe*, 255 AD2d 1003 [4th Dept 1998], *lv*

denied 93 NY 801 [1999] [petitioner who resided across the street from the project had standing to bring SEQRA challenge]), but "standing cannot be based on the claim that 'a project would "indirectly affect traffic patterns, noise levels, air quality and aesthetics throughout a wide area"'" (*Matter of Save our Main Street Buildings v Greene County Legislature*, 293 AD2d 907 [3d Dept 2002] [citations omitted]).

In terms of SEQRA's zone of interest, as noted by the Court of Appeals in *Society of Plastics, supra* "[t]he purposes of SEQRA ... are to encourage productive and enjoyable harmony with our environment; 'to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state'; 'the zone of interests, or concerns, of SEQRA encompasses the impact of agency action on the relationship between the citizens of this State and their environment. Only those who can demonstrate legally cognizable injury to that relationship can challenge administrative action under SEQRA'" (*Society of Plastics, supra* 77 NY2d at 777; *see also Matter of Boyle v Town of Woodstock*, 257 AD2d 702, 704 [3d Dept 1999]; *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990]; *Matter of Buerger v Town of Grafton*, 235 AD2d 984, 984, 985 [3d Dept 1997], *lv denied* 89 NY2d 816 [1997]). Thus, the zone of interest test is intended to thwart the ability of "challenges unrelated to environmental concerns" and the "danger of allowing special interest groups or pressure groups, motivated by economic self-interests, to misuse SEQRA for such purposes" (*Society of Plastics,* 77 NY2d at 774). Thus, even if an issue is of vital public concern, that does not entitle a person to standing (*Society of Plastics*, 77 NY2d at 769).

The organizational standing requirements set forth in *Society of Plastics, supra*, are: (1) whether one or more members have standing to sue; (2) that the interests asserted by the organization are germane to its purposes such that it is the appropriate representative of those interests; and (3) "that neither the asserted claim nor the appropriate relief requires participation of the individual members" (*Society of Plastics,* 77 NY2d at 786).

The question of SEQRA standing was recently addressed again by the Court of Appeals in *Sierra Club v Village of Painted Post* (26 NY3d 301 [2015]). In that case, the Village of Painted Post adopted a resolution to enter into a surplus water sales agreement with Respondent SWEPI,

LP (a Shell Oil Co. subsidiary) wherein the Village would provide SWEPI with up to 1 million gallons of water per day with an option to increase it by 500,000 gallons a day, and further determined that the action was a Type II action (exempt from SEQRA review) (*Sierra Club*, 26 NY2d at 306). The Village also determined that another resolution regarding a lease agreement with respondent Wellsboro & Corning Railroad for the construction of a water transloading facility on 11.8 acres of land (previously used for industrial purposes) at which the water would be withdrawn, loaded and transported via rail to Wellsboro, Pennsylvania, was a Type I Action, but the Village issued a negative declaration with regard to its SEQRA review. Petitioners instituted an Article 78 proceeding challenging, *inter alia*, the Village's SEQRA determinations. The petitioners in *Sierra Club* were both organizational petitioners Sierra Club, People for a Healthy Environment, and Coalition to Protect New York, as well as various residents of the Village including petitioner, John Marvin, who lived less than a block away from the rail loading facility. In his affidavit submitted in opposition to respondents' motion to dismiss based on petitioners' lack of standing, Marvin averred that "when the water trains began running, he 'heard train noises frequently, sometimes every night' and that '[t]he noise was so loud it woke [him] up and kept [him] awake repeatedly'" (*Sierra Club*, 26 NY2d at 308). "Marvin further stated that the 'noise was much louder than the noise from the other trains that run through the [V]illage' and he was concerned that the 'increased train noise will adversely impact [his] quality of life and home value'" (*id.*).The trial court found that while the organizational petitioners as well as all the individual petitioners lacked standing as they alleged only generalized environmental injuries (*e.g.*, disrupted traffic patterns, noise levels, and water quality) no different than that experienced by the general public, the proceeding could proceed based on Marvin's standing based on his unique noise injury. On appeal, the Appellate Division, Fourth Department, reversed, finding that Marvin lacked standing since Marvin was complaining with regard to the noise of a train that moved through the entire Village, rather than the noise associated with the transloading facility itself (*i.e.*, Marvin did not suffer injury different in kind or degree from the public at large).

On appeal, the Court of Appeals found that the Appellate Division had imposed "an overly restrictive analysis of the requirement [set forth in *Society of Plastics*] to show harm 'different from that of the public at large' ...." (*id.* at 310). The Court explained that the fact that more than one

person may be harmed is not dispositive of the issue. In this regard, the Court expressed the view that while the harm must be specific to the petitioners and different in kind and degree from the public at large, it need not be unique. Thus, "Marvin [was] not alleging an indirect, collateral effect from the increased train noise that will be experienced by the public at large, but rather a particularized harm that may also be inflicted upon others in the community who live near the tracks" (*id.*). The Court also rejected the Appellate Division's reasoning that because multiple residents were impacted, no resident of the Village could have standing. The Court noted that because noise fell within SEQRA's zone of interest, the Appellate Division's reasoning "would effectively insulate the Village's actions from any review and thereby run afoul of [the Court's] pronouncement that the standing rule should not be so restrictive as to avoid judicial review" (*id.*). The Court found Marvin's allegation that he was kept up at night because of the increased train noise (even without differentiating the noise from the tracks as opposed to the noise from the transloading facility) were injuries real and different from the injuries that most members of the public faced.

One of the environmental injuries invoked by Petitioners is that they will suffer from the deleterious effects the BJ's Project will have on traffic. It is well settled that traffic congestion is within SEQRA's zone of interest; however, the petitioner must be in close proximity to the project such that petitioner's injuries are different in kind and degree from the members of the general public (*cf. Matter of Turner, supra* 136 AD3d at 1298, *citing Matter of Pelham Council of Governing Bds. v City of Mount Vernon Indus. Dev. Agency,* 187 Misc 2d 444 [Sup Ct, Westchester County 2001], *lv dismissed* 302 AD3d 393 [2003]; *Matter of Jackson v City of New Rochelle*, 145 AD2d 484 [2d Dept 1988], *lv denied* 73 NY2d 706 [1989]).

In *Matter of Duke & Benedict, Inc. v Town of Southeast* (253 AD2d 877 [2d Dept 1998]), the Appellate Division, Second Department, held that the adjoining property owner to property which the Town of Southeast rezoned from "office professional" to "highway commercial" so that a large retail store could be built on the site had standing to challenge the Town's negative declaration under SEQRA since petitioner alleged that the rezoning would lead to, *inter alia,* increased traffic effects (*Matter of Duke & Benedict, Inc.*, 253 AD2d at 878; *see also Matter of Heritage Co. of Massena v Belanger*, 191 AD2d 790 [3d Dept 1993] [mall owner had standing to

assert SEQRA challenge to project across the street based on concerns of increased traffic and air pollution]; *Matter of Muir v Town of Newburgh*, 49 AD3d 744 [2d Dept 2008] [petitioner residing 1,000 feet from project would suffer visual, noise, traffic and water impacts different from the public at large and had standing]; *Matter of Napolitano, supra* [petitioners who resided within a mile of the proposed project had standing based on their concerns over increased traffic and noise to challenge the Town's rezoning of property from Rural Commercial to a hybridized Highway Commercial (HC-1) zone]). Of course, if the petitioner is not in close proximity to the project, standing based on generalized traffic concerns will not be found (*Matter of Bridon Realty Co. v Town Bd. of Town of Clarkstown*, 250 AD2d 677 [2d Dept 1981], *lv denied* 92 NY2d 813 [1998] [no standing for petitioners of strip mall that was deficient in terms of proximity to the project to be able to rely on traffic congestion as basis for SEQRA standing]; *Matter of Harris, supra* [petitioners who did not reside in close proximity to project "failed to demonstrate that the alleged increased traffic congestion and negative effects on the businesses along the Route 58 corridor are injuries specific to them and distinguishable from those suffered by the public at large"]; *Matter of Riverhead PGC, LLC v Town of Riverhead*, 73 AD3d 931 [2d Dept 2010], *lv denied* 15 NY3d 709 [2010] [landlord of strip mall which had Wal-Mart as tenant located two miles from proposed site of new Wal-Mart Supercenter lacked standing to seek to annul site plan and variance approvals for site; no presumption of injury in fact because not sufficient proximity and the injury implicated did "not implicate an interest protected by the local laws and town code provisions at issue. Economic harm caused by business competition is not an interest protected by the zoning laws ... In any event, the petitioner has not adequately demonstrated actual injury-in-fact with its speculation that increased traffic congestion to the west of its property will significantly damage its customer base, including customers who travel from other directions"]; *Matter of Darlington v City of Ithaca Bd. of Zoning Appeals*, 202 AD2d 831 [3d Dept 1994] [no SEQRA standing for petitioner who resided ½ mile from project site and who raised traffic congestion as environmental harm]).

In *Matter of Lo Lordo v Board of Trustees of Inc. Village of Munsey Park* (202 AD2d 506 [2d Dept 1994]), the Appellate Division, Second Department, affirmed the trial court's finding that petitioners, who owned/resided near the proposed project had SEQRA standing based on their assertions that they would be negatively impacted by traffic congestion and the petitioners did not

have to prove that they would be negatively impacted to establish standing. In this regard, the Second Department held that

> [a] property owner has standing to seek review of an agency's compliance with the ... [SEQRA] if the owner has a significant interest in having the mandates of SEQRA enforced ... If an owner has such a significant interest, even if it cannot presently demonstrate an adverse environmental effect, "it nevertheless has a legally cognizable interest in being assured that the decision makers, before proceeding, have considered all of the potential environmental consequences, taken the required 'hard look', and made the necessary 'reasoned elaboration,' of the basis for their determination" ... It has been held that the status as owners or residents of property near the site of a proposed project, coupled with an allegation of actual or potential noneconomic harm, leads to an inference of potential injury .... We find the petitioners' allegations of potential injury are supported by the record and that the petitioners have demonstrated that they are within the zone of interest protected by SEQRA. Traffic congestion, such as that alleged by the petitioners had been held to be an environmental issue within the zone of interest of SEQRA ... Thus, in the present proceeding, the petitioners have each alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA" (*id.* at 507; *see also Matter of Long Island Contr. Assn. v Town of Riverhead*, 17 AD3d 590 [2d Dept 2005]; *Matter of Bloodgood v Town of Huntington*, 58 AD3d 619 [2d Dept 2009]).

Applying the foregoing standing prir ciples, the Court finds that all of the Petitioners, except YGM, have standing to pursue their claims. Quick Stop is located approximately 750 feet from the Project and Akram avers that he purchased the property in reliance on it being C-1 Zoning across the street. This type of allegation has been found sufficient in terms of the zone of interests covered by zoning laws (*Cremosa Food Co. v Petrone*, 304 AD2d 606 [2d Dept 2013] [depreciation in value of property as a result of challenged rezoning amendment is within zone of interests covered by zoning laws]). Further, while at its essence, Quick Stop is concerned about the increase in competition, it has also asserted arguments that the rezoning does not comport with the CP, which is a recognized SEQRA injury. Accordingly, the Court finds that Quick Stop has standing to pursue its claims.

Scotto lives approximately 750 feet from the Staples Plaza and in his affidavit, in addition to his concern over his position that the rezoning does not comport with the CP, he also raises concerns over traffic, flooding and pollutants. He claims that his property already has been negatively affected by various developments along the Route 202/35 corridor that have caused his property to flood given that it abuts the Hunter Brook. He further alleges that the BJ's Project will

cause increased discharges and pollutant loads on his property. Given that Scotto lives approximately 750 feet from the rezoning, he has presumptive SEQRA standing. And even if he didn't have presumptive SEQRA standing, Scotto has established standing by alleging that he will suffer a direct harm (*e.g.* flooding and the potential for pollutants) that is different in kind from the injury to the general public and falls within SEQRA's zone of interests (*Matter of Ten Towns to Preserve Main Street v Planning Bd. of Town of North East*, Index # 3816/2013 [Sup Ct, Dutchess County Dec. 11, 2013 [Sproat, J.], *affd on other grounds*130 AD3d 740 [2d Dept 2016] [petitioner who lived less than a mile from project site whose property was prone to flooding given its location next to creek had standing given proximity to the project which made it inferable that risk of environmental harm was different from the public at large and her allegations of excessive flooding fell within SEQRA's zone of interest, *citing Kelsky v Town Bd. of Town of Lewisboro*, 215 AD2d 482 [2d Dept 1995]). The Court does not agree with Respondents' argument that because Scotto has not proven that any of these concerns are supported by empirical evidence, he cannot assert standing based on these speculative concerns. Indeed, it is only if the EAF "categorically controvert[s] petitioner's claims of injury" that the Court may deny standing based on speculative injury (*Matter of Many v Village of Sharon Springs Bd. Of Trustees*, 218 AD2d 845 [3d Dept 1995] [petitioner's allegations that project would cause changes in hydro geologic formations and patterns of storm water beneath project site and would affect the springs on his property as well as the quality or quantity of water in private well sufficient to confer standing]).

With regard to YSG's standing, based on the three-part test, it would appear that YSG has standing to bring this action since Scotto is a member of that organization, who has established standing in his own right and therefore, his standing "is attributable to that organization" (*Matter of Coalition for Future of Stony Brook Village v Reilly*, 299 AD2d 481, 484 [2d Dept 2002]). Further, the interest of YSG to require what they contend Yorktown promised in its CP concerning pedestrian-friendly, non-auto-centric, village style, mixed use development is obviously germane to its stated purpose. Finally, it is evident "that neither the asserted claim nor the appropriate relief requires participation of the individual members."

YSG's standing is similar to the standing found by the Appellate Division, Second Department's decision in *Matter of Coalition for Future of Stony Brook Village, supra.* In that

case, as here, the Coalition for the Future of Stony Brook Village was specifically formed to save an area known as the Forsythe Meadows. In July 2000, Suffolk County purchased 36 of the 43 acres of the Forsythe Meadows for conservation purposes. However, the owner of the remaining property submitted an application in August 2000 to expand the Stony Brook Post Office and construct an Educational and Cultural Center in the Forsythe Meadows. In that case, the Second Department found that two members of the coalition had standing to bring the proceeding and since they were members of the Petitioner Coalition, their standing was attributable to the Coalition. In addition, the Court held that "interests asserted by the Coalition are germane to its purposes, and neither the asserted claim nor the appropriate relief requires participation of the individual members"(*Matter of Coalition for Future of Stony Brook Village v. Reilly*, 299 AD2d at 484; *see also Matter of Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 AD2d 342, 345 [4th Dept 1999]).

However, YGM, whose property is not within close proximity to the Project does not have presumptive standing with regard to the rezoning and it cannot base its SEQRA standing on concerns over generalized concerns over traffic congestion since its property is not sufficiently close to the site.[30]

THE STANDARD OF REVIEW APPLICABLE TO PETITIONERS' CLAIMS

A proceeding brought pursuant to CPLR 7803(3), otherwise referred to as mandamus to review, asks the Court to review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary, capricious or an abuse of discretion" (CPLR 7803[3]). It involves "judicial review of agency determinations that are 'administrative,' as

[30]It is well settled that a petitioner's residing one half of a mile from the site is not sufficient proximity to confer standing (*Matter of Many*, 218 AD2d 845 [increased traffic does not afford standing]; *Matter of Radow v Board of Appeals of Town of Hemptstead*, 120 AD3d 502 [2d Dept 2014] [.69 miles away does not afford a presumption of injury and allegations of injury in fact based on overcrowding and congestion speculative and no different from public at large]). Thus, because the traffic issues would not affect YGM any differently from the impacts felt by the general public, and because YGM is not sufficiently close to the project to have presumptive standing based on the rezoning, YGM does not have standing based on traffic concerns (*Matter of City of Plattsburgh v Mannix*, 77 AD2d 114 [3d Dept 1980]).

opposed to judicial or quasi-judicial in nature." "The arbitrary and capricious standard is used to examine fact-finding determinations only in mandamus to review" (Commentaries, citing *Matter of Halperin v City of New Rochelle*, 24 AD3d 768 [2d Dept 2005], *lv dismissed* 6 NY3d 890 [2006], *lv dismissed* 7 NY3d 708 [2006]]). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith'" (*Matter of Halperin, supra,* 24 AD3d at 771). "A determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (*id,* 24 AD3d at 771). As set forth in detail infra, while the standard of review under SEQRA is slightly different, it is still based on the notion that such administrative determinations must be rational and based on evidence.

With regard to Petitioners' claim that the Town Board improperly interpreted the Code in its issuance of the SUP, it is well settled that where the allegation is that the agency improperly interpreted or applied a statute or regulation courts will uphold the interpretation of statutes and regulations by the agencies responsible for their administration if such interpretation is reasonable (*New York City Health and Hosp. Corp. v McBarnette*, 84 NY2d 194, 205 [1994]; *Howard v Wyman*, 28 NY2d 434, 438 [1971]; *Marburg v Cote*, 286 NY 202, 212 [1941]).

However, a Court's deferral to an agency's reasonable interpretation is not sacrosanct. In this regard, Petitioners cite to the Hon. Jonathan Lippman's decision in *Mamaroneck Beach & Yacht Club v Fraioli*, 2007 NY Slip Op 50118[U], 4 Misc 3d 1221[A] [Sup Ct, Westchester County 2007], *affd* 53 AD3d 494 [2d Dept 2008], *lv denied* 11 NY3d 712 [2008]), for the standards that are to be applied by a Court in its review of a municipality's interpretation of its zoning code:

> There are several well settled principles that govern this Court's review of the ZBA's determination. First, "[a] zoning board's interpretation of a zoning code is 'not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court' ... Thus, where ... the interpretation of a zoning code is irrational or unreasonable, a zoning board's determination will be annulled" (*Matter of Tartan Oil Corp. v Bohrer*, 249 AD2d 481, 482 [1998], quoting *Matter of Exxon Corp v Board of Standards and Appeals of City of New York*, 128 AD2d 289, 296 [1987] ["the Board's

interpretation of what constitutes an accessory use is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court"]. "[W]here 'the question is one of pure legal interpretation of statutory terms, deference to the ... [administrative agency] is not required'" (*Matter of New York Botanical Garden v Board of Standards and Appeals of the City of New York*, 91 NY2d 413, 419 [1998], quoting *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]).

Second, "'[w]here [a] statute is clear and unambiguous on its face, the legislation must be interpreted as it exists. Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute' .... 'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used'" (*Matter of Orchard Glen Residences and Carriage Houses, LLC v Erie County Industrial Dev. Agency*, 303 AD2d 49, 51 [2003], *lv denied* 305 AD2d 1127 [2003], *lv denied* 100 NY2d 511 [2003]; quoting *Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669 [1988]; *see also Matter of Toys "R" Us*, 89 NY2d at 420). As pronounced by the New York Court of Appeals, when an administrative agency's "interpretation conflicts with the plain statutory language ... [it] may not be sustained" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997]).

With the foregoing standards of review in mind, the Court turns to the sufficiency of Petitioners' claims.

PETITIONERS' FIRST CAUSE OF ACTION

In their First Cause of Action, Petitioners allege that pursuant to Town Law § 272-a (11), if a Town adopts a comprehensive plan, "'[a]ll town land use regulations must be in accordance with [that] comprehensive plan'" (Petition at ¶ 179) and here, the Town Board adopted the CP in 2010. According to Petitioners, by rezoning a portion of the Staples Plaza and by approving the SUP, the Town Board violated Town Law § 272-a(11) because both the rezoning and the SUP issuance were antithetical to the CP's Policies 4-21, 4-24 and 5-2 by: (1) increasing the intensity of use along a corridor where it was agreed that density of use was to be decreased to 75% of the pre-existing levels; (2) approving auto-centric GFS and regional destination retail at the Staples Plaza that the CP had directed to be redeveloped into a pedestrian-friendly, mixed-use, village-style development with workforce housing; (3) approving a GFS at the precise location which the SDS and CP specifically recommended be reshaped with no GFS (Petition at ¶¶ 188).

Petitioners are accurate that Town Law § 272-a (11) states that the effect of the adoption of

a Town's Comprehensive Plan is that "[a]ll town land use regulations must be in accordance with a comprehensive plan." However, Town Law § 272-a defines a "land use regulation" as an ordinance or local law enacted by the town for the regulation of any aspect of land use and community resource protection and includes any zoning, subdivision, special use permit or site plan regulation or any other regulation which prescribes the appropriate use of property or the scale, location and intensity of development" (Town Law § 272-a[2][a]). Accordingly, because it is well settled that "special permit decisions, even when made by a legislative body, are considered administrative decisions for the purpose of judicial review under Article 78" (*Lemir Realty Corp. v Larkin*, 11 NY2d 20 [1962]), the First Cause of Action shall be dismissed to the extent it seeks to invalidate the SUP issuance.

With regard to the rezoning, the Court does not agree that by rezoning Lot 75 and part of Lot 76 to a C-3 Zoning District (and in issuing the SUP), the Town Board violated the CP's Policies 4-21, 4-24 and 5-2 in that the CP envisioned redeveloping the Staples Center into a hamlet-style, mixed use development with workforce housing. First, while Policy 4-21 states that the overall concept is to make the BMT a mixed-use business center, the Crompond Conceptual Design, Figure 4-2 clearly delineates the Shopping Center as continuing on as a Shopping Center, whereas the mixed-use hamlet development, contrary to Petitioners' position, was to occur across Rt. 202 on the north side of the street as set forth in Policy 4-24.

Furthermore, as noted by the Town Board in its rezoning resolution, the BJ's Project was consistent with the CP because the Staples Plaza is located in the BMT, which was identified by the CP as the

> Town's 'major opportunity site for economic development.' (Comprehensive Plan at ES-5,4-1) ... The Proposed Gas Station would contribute to the continued economic viability of the existing Shopping Center and the important BMT commercial corridor (See,e.g.,Comprehensive Plan at 4-1). The Proposed Gas Station would result in an improvement to Yorktown BJ's and the Shopping Center, which is consistent with the goals in the Comprehensive Plan to encourage the development of retail uses "with a regional draw." (Id. at ES-7) ... The increased economic viability of the Shopping Center resulting from the Proposed Gas Station would make the BMT more attractive for the future development of a mix of uses encouraged in the BMT by the Comprehensive Plan, such as "senior housing, office and retail uses, and possibly a hotel or country inn as well." (Comprehensive Plan at ES-5, 4-1; see also id.at 4-13 (encouraging development in the BMT to create a "mixed-use center.")). (R1240).

The Court further agrees with Respondents that since the State Lands Project was located west from the Staples Plaza and on the north side of Rt. 202/35, the denial of a rezoning to C-3 by the Town Board to avoid the possibility for gas station development does not render the Town Board's decision to rezone part of the Staples Plaza to C-3 arbitrary or capricious.

As the Town Board recognized, the rezoning of the portion of the Staples Plaza was "consistent with the surrounding zoning classifications" since it was "bordered to the east by property zoned C-3" and "[t]he parcel directly across Crompond Road from the located of the Proposed Gas Station on Lot 76 is also zoned C-3. Rezoning the Subject Area to C-3 would serve to connect these two (2) areas of the C-3 Zoning District" (R1249; *see also* Ex. B, R1256).

PETITIONERS' SECOND AND FOURTH CAUSES OF ACTION

In their Second and Fourth Causes of Action, Petitioners seek to have the Town Board's rezoning annulled as arbitrary and capricious because the Board abused its police powers by engaging in illegal spot zoning. As an initial matter, the Court notes that Petitioners' reply is devoid of any further support for these assertions. As such, Petitioners appear to concede that spot zoning is not an issue in this action. Nor should it be.

Spot zoning "is defined as the process of singling out a small parcel of land for a use classification totally different from that of surrounding area for the benefit of the owner of said property to the detriment of other owners ... Although a number of factors are relevant in ascertaining whether a zoning amendment fits within this definition ... the ultimate test is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community" (*Daniels v Van Voris*, 241 AD2d 796, 799 [3d Dept 1997]; *see also Little Joseph Realty, Inc. v Town Bd. of Town of Babylon*, 52 AD3d 478 [2d Dept 2008]).

It is well settled that "'zoning determinations enjoy a strong presumption of validity, which can only be overcome by a showing that the decision to rezone was unreasonable and arbitrary'" (*Matter of Rayle v Town of Cato Board*, 295 AD2d 978, 978 [4th Dept 2002], *quoting Matter of Save our Forest Action Coalition v City of Kingston*, 246 AD2d 217, 221 [3d Dept 1998]). "The party challenging a zoning enactment on the ground that it is contrary to a comprehensive plan

assumes a heavy burden to counter the strong presumption of validity accorded the enactment ... Where the validity of the ordinance or amendment is fairly debatable, it may not be set aside" (*Taylor v Incorporated Village of Head of Harbor*, 104 AD2d 642, 644-645 [2d Dept 1984]). Where a plaintiff "fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld" (*Bergstol v Town of Monroe*, 15 AD3d 324, 325 [2d Dept 2005]).

The crux of Petitioners' argument hinges on their contention that the Staples Plaza was to be reshaped as a mixed-use, pedestrian-friendly hamlet style development with second story housing. It is also predicated on Petitioners' view that the rezoning only benefitted BJ's and did nothing to promote the overall public welfare of the Yorktown residents. However, nothing in the CP supports Petitioners' position that the Staples Plaza was to be altered from its current form of a strip mall with large big box retail and parking lots to accommodate its car-driven (not bicycle-driven) shoppers. Even prior to its rezoning to a C-3 Zoning District, residential housing was not a permitted use (Code §§ 300-21[c][8] & [12]). Thus, the inclusion of the GFS did not cause the death knell to the potential for housing in the Staples Plaza. In any event, given that a BJ's, Staples (big box retail) and Dunkin Donuts are located in the Staples Plaza, it is highly unlikely that the Staples Plaza could ever be reshaped by smaller shops with second story housing. Furthermore, the change of zoning to a C-3 Zoning District was not inconsistent with the CP, particularly given the land at issue was both adjacent to, and across the street from, other land zoned C-3. In his reply affidavit, Nettelfield concedes that adding commercial development to the Staples Plaza is not necessarily against the CP since the addition of viable business to the CHBD reinforces its value to the community. Indeed, one of the primary goals of the CP was to instill economic vitality to the BMT by encouraging the development of stores with a regional draw because economic vitality furthered community goals through decreased taxes. Ensuring the continued economic viability of the Staples Plaza may have a secondary benefit of increasing BJ's profits, but the primary goal was to further the community's economic goals. Given the clear intent found in the CP in Diagram 4-2 that the Staples Plaza was to remain the Staples Plaza, and given the language in Policy 4-21 making clear that the mixed-use hamlet style development was to occur on the north side of Route 202, the Court finds that Petitioners have not met their heavy burden of establishing a clear conflict between the BJ's rezoning and the goals set forth in the CP. Accordingly, as the rezoning of Lot 75

and part of Lot 76 did not single "out a small parcel of land for a use classification totally different from that of surrounding area for the benefit of the owner of said property to the detriment of other owners," and because its use is consistent with the CP, Petitioners' Second Cause of Action seeking to annul the rezoning as illegal spot zoning shall be dismissed.

PETITIONERS' FIFTH AND SIXTH CAUSES OF ACTION

In their Fifth and Sixth Causes of Action seeking the annulment of the SUP, Petitioners make several arguments for why the Town Board exceeded their lawful authority in issuing the SUP, however, the primary contention has to do with their view that the Town Board improperly interpreted the Code as permitting a GFS on the same site as a Big Box retail establishment.

The Court begins it analysis with the well settled principle that a special use permit "'gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right'" (*White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead*, 93 AD3d 731, 731-732 [2d Dept 2012], *quoting Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195 [2002]; *see also Mandis v Gorski*, 24 AD2d 181 [4th Dept 1965]). "'The classification of a "special permit" or "special exception" is tantamount to a legislative finding that, if the special permit or exception conditions are met, the use will not adversely affect the neighborhood and surrounding areas'" (*Matter of Sea Cliff Equities, LLC v Board of Zoning Appeals of Inc. Village of Sea Cliff*, 106 AD3d 923, 924 [2d Dept 2013] [citations omitted]). To obtain approval, the applicant needs to only show that the project meets with the legislatively imposed conditions or that there is a basis to waive such conditions (*White Castle, supra; Matter of Hamptons LLC v Rickenbach*, 98 AD3d 736 [2d Dept 2012]).

According to Respondents, and not disputed by Petitioners, pursuant to Town Code § 300-21, the retail and wholesale uses of the BJ's Project are permitted as of right in a C-3 Zoning District and GFSs are permitted by the Town Board's issuance of a SUP (Town Code §§ 300-21[12][a][1], [a][3] and [b][5]). While Petitioners try to distinguish the examples provided by Costco's counsel (see letter of from Al Capellini to Town Board dated December 18, 2014) where two or more principal uses in Yorktown's commercial districts were permitted, the Court fails to see why a GFS is distinguishable from other principal uses. It is Petitioners' position that the

gasoline dispensary for the BJ's Project was, by definition and practice, accessory to its principal retail use and the Town Board's issuance of the SUP "amend[ed] the zoning code by converting the definition of a GFS from an independent stand-alone 'main use' into an 'accessory use' as gasoline outlet subordinate to an existing large scale retail use" (Ps' Reply at 5). Petitioners contend that based on the history of the GFS statute in Yorktown, while a GFS was a permitted main use in the C-3 District, it was intended that some accessory uses would be prohibited and others limited (*i.e.*, retail use of a convenience store could not exceed 1,000 square feet). Moreover, Petitioners contend that no deference can be afforded to the Town Board since the SUP resolution "avoids any discussion of why BJ's Tire Service Center and gasoline dispensary operated by the same company and located on the same site are actually two separate uses not subject to the Code's definition of GFS or 'lot.' Again, the oversight is fatal" (Ps' Reply at 6).

With regard to the express definitions, Petitioners argue that Section 300-46 limits retail on a GFS to a convenience store, and while the C-3 zone allows retail and GFS as separate main uses, they may not be combined as a single use on one lot. Relying on the definitions of (1) a GFS which "extends to any land, structures or buildings used for the sale of 'motor vehicle accessories,'" and (2) a lot as "[a] parcel of land, not divided by streets, occupied or to be occupied by a building and its accessory buildings or by a dwelling group and its accessory buildings, together with such open spaces as are required under the provisions of this chapter, and having its principal frontage on a street," Petitioners assert that the "BJ's store, which also houses a Tire Center, and its GFS are situated on the same lot, which shares the same frontage, the same ingress and egress, the same curb cuts and are operated by the same company offering BJ's brand of gasoline. BJ's GFS and the other retail stores in the Plaza are shown as one integrated project on a single site plan" (Ps' Reply at 51).[31] It is Petitioners' position that the BJ's store is subject to the GFS requirements because it

[31] Petitioners refute Respondents' position that somehow because there are two lots involved, there are not two uses being put to the property by relying on the definition of GFS which covers all lands and buildings used for the sale of gasoline or motor vehicle accessories and thus, the definition is not limited to the tax lot on which the BJ's GFS is situated (Ps' Reply at 43). Petitioners further rely on the Code's definition of a lot, which they contend, does not limit "the definition of 'lot' to a single tax parcel or zoning a portion of a lot to allow a different use on a portion of a lot. A lot is instead defined by the principle [sic] use of the land and its accessory buildings. Thus, although the Staples Plaza consists of many retail buildings and two tax lots, the

includes a Tire Center (*id.* at 52-53). Thus, Petitioners contend that the Town Board's resolution is infirm because it claims the GFS lot is restricted to Tax Lot 76, which disregards BJ's position that the GFS is an extension of BJ's since it offers another amenity to members. According to Petitioners, the Town Board is inconsistent because on the one hand, it "avoids the definition of a GFS by stating that the BJ's GFS lot exceeds the minimum lot size for GFSs, lot frontage and depth requirements" by relying on Tax Lot 76, but on the other hand, "to evade §300-46's limitation on GFS retail to a convenience store, respondents argue that the entirety of Lot 76 should not be governed by § 300-46" (Ps' Reply at 52). In so doing, Petitioners argue that Respondents "have invented a new definition of 'lot' unique to BJ's GFS. 'Gasoline Filling Station' is redefined from '[a]ny area of land, including structures thereon, or any building or part thereof that is used for the sale of gasoline or motor vehicle accessories' to 'that portion of a tax lot only used to dispense gasoline with the caveat that the entire tax lot may be used to meet 300-46's lot frontage and area requirements'" (*id.* at 53).

Code § 300-3 defines a GFS as "[a]ny area of land, including structures thereon, or any building or part thereof that is used for the sale of gasoline or motor vehicle accessories and which may or may not include facilities for lubricating, washing or otherwise servicing motor vehicles, but not including body work, major repair or painting thereof by any means" (Code § 300-3). Lot is defined as "[a] parcel of land, not divided by streets, occupied or to be occupied by a building and its accessory buildings or by a dwelling group and its accessory buildings, together with such open spaces as are required under the provisions of this chapter, and having its principal frontage on a street." Code § 300-11B entitled "General restrictions on buildings, uses and lots," provides that "Lot for every building. Every building hereafter erected shall be located on a lot as herein defined and, except as herein provided, there shall be not more than one main building and its accessory buildings on one lot, except for nonresidential buildings and multifamily dwellings in districts where such uses are permitted." Code § 300-21(C)(12) governs the uses permitted in the C-3 District which are all the retail, wholesale and storage uses permitted in the C-2 District (i.e., such as the BJ's Wholesale Club at issue here) together with the right for GFSs provided a SUP is issued in accordance with the standards set forth in Code § 300-46.

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principal use of the lot is large scale retail" (Ps' Reply at 51).

Code § 300-36 regulates the standards applicable to all special uses subject to SUPs, which are:

A. The location and size of the use, the nature and intensity of the operation involved in or conducted in connection with it, the size of the site in relation to it and the location of the site with respect to streets giving access to it shall be such that it will be in harmony with the appropriate and orderly development of the district in which it is located.
B. The location, nature and height of the buildings, walls and fences and the nature and extent of the landscaping on the site shall be such that the use will not hinder or discourage the appropriate development and use of adjacent land and buildings or impair the value thereof.
C. Operations in connection with any special use shall not be more objectionable to nearby properties by reason of noise, vibration, excessive light, smoke, gas, fumes, odor or other atmospheric pollutants than would be the operations of any permitted uses.
D. Parking areas shall be of adequate size for the particular use, properly located and suitably screened from adjoining residential uses, and the entrance and exit drives shall be laid out so as to prevent traffic hazards and nuisances.

Code § 300-46 is the provision regulating GFSs. The General Regulations provide that the use of a GFS "shall be limited to the retail sale of motor fuels, lubricants and other motor vehicle supplies and parts, repair and service activities, excluding body and fender work, and the accessory parking and storage of motor vehicles as hereinafter limited" (Code § 300-46[A][1]). It further provides that convenience stores shall be permitted as prescribed herein. Finally, the statute regulates the location and number of GFSs, the lot size, the frontage and depth, the number of driveways and their maximum footage, the maximum coverage, the setbacks for the buildings and for the GFSs, the number and location of fuel pumps, the location and height of canopies, the number and location of parking spaces, the storage of vehicles, the requirements concerning luminaires and signs, and the outdoor display of tires. In addition, the statute provides that "[t]he Town Board may, for good cause shown, vary the requirements above, including the sign limitations. Furthermore, maximum height limitations for canopies may be waived and peaks may be permitted on canopies, if approved by the Town Board."

Turning to Petitioners' various arguments for why the approval of the SUP is contrary to the Code, the Court does not agree with Petitioners that the definition of the GFS found in Code § 300-3 proves that it is an exclusive main use. As noted above, Code § 300-3 defines a GFS as "[a]ny area of land, including structures thereon, or any building or part thereof that is used for the

sale of gasoline or motor vehicle accessories and which may or may not include facilities for lubricating, washing or otherwise servicing motor vehicles, but not including body work, major repair or painting thereof by any means" (Code § 300-3). An accessory use is defined in Town Code § 300-3 as "'[a] use which is customarily incidental and subordinate to the principal use of the lot, water area or a building and located on the same lot or water area therewith." Here, while Respondents are not contending that the GSF is an accessory use, Petitioners argue that the Town Board has, in essence, defined it as an accessory use. The Court agrees that there is nothing "accessory" about a GFS involving 12 gas pumps in the parking lot of an approximately 100,000 square foot wholesale price club regardless of how prevalent these may be appearing at various BJ's across the country.

In *Matter of Genesee Farms, Inc. v Scopano* (77 AD2d 784 [4th Dept 1980]), the Appellate Division, Fourth Department, held that the addition of a gasoline island to a dairy goods store constituted a service station and not an accessory use. In *Matter of Genesee Farms*, the Village Code defined an accessory use exactly as it is defined in Section 300-3 (*i.e.*, "[a] use customarily incidental and subordinate to the principal use of building or land and located on the same lot with such principal use of building or land"). In *Matter of Genesee Farms*, the Village Code further defined a service station with almost identical language to the language found in the Code's definition of a GFS (*i.e.*, "[a]ny area of land including structures thereon, or any building or part thereof that is used for the sale of motor fuels or motor vehicle accessories and which may include facilities for lubrication, washing, or otherwise servicing motor vehicles, but not including body work, major repair, or painting thereof by any means"). Deciding that the Dairy Store's proposal to add fuel pumps and an island outside the store did not constitute an accessory use, the Court held:

> There is no doubt that it is petitioner's intention to use the land for the sale of motor fuels and as such the proposed use constitutes a service station under the ordinance. Nor may it be said in these circumstances that the sale of gasoline is a use customarily incidental and subordinate to a principal use as a dairy goods store. Most zoning ordinances require special permits for service stations (see, generally, 1 Anderson, New York Zoning Law and Practice [2d ed], §§ 11.15-11.25), thus recognizing that the sale of gasoline, whether pumped from a traditional service station or from a relatively modern self-service gasoline island, is inherently different from the sale of other products. It is that difference which leads us to conclude that the sale of gasoline is wholly unrelated to the sale of dairy goods and thus may not be viewed as an accessory use of petitioner's property (*Matter of Genesee*

Farms, 77 AD2d at 785).

The Fourth Department went on to note that it did not appear that the Dairy Farm had applied to the Village Board for a special use permit, which was applicable to any request to build a service station, and that in the event that the Dairy Farm decided to apply for a SUP, in considering such an application, the Village Board should apply those standards in accordance with established judicial rules. Thus, the Fourth Department specifically recognized that the service station use was a permitted non-accessory use, but that it was subject to the issuance of an SUP, which is what occurred here.

As the Fourth Department recognized *in Matter of Genesee*, simply because the BJ's GFS does not qualify as an accessory use does not end the inquiry since it may be completely proper as another primary/principal/main use. In *Cummings v Town Bd. of Town of North Castle* (95 AD2d 818 [2d Dept 1983]), the applicant sought to operate a nursery on property located in a two-acre single family residence district that allowed nurseries through the Town Board's issuance of an SUP. In affirming the trial court's dismissal of the petition, the Appellate Division, Second Department rejected the petitioners' argument that the SUP illegally condones the use of two principal uses for property. Indeed, in *Carpionator v ZBA Town of Johnston* (2005 WL 1216515 [R.I. Superior Court 2005]), the Rhode Island Superior Court affirmed the Town's approval of a SUP for proposed fuel dispensers at an already existing BJ's.

Here, there is nothing in the Town Code that prohibits more than one principal use on a given property in the C-3 District. Instead, Code § 300-11B entitled "General restrictions on buildings, uses and lots," provides that "Lot for every building. Every building hereafter erected shall be located on a lot as herein defined and, except as herein provided, there shall be not more than one main building and its accessory buildings on one lot, **except for nonresidential buildings and multifamily dwellings in districts where such uses are permitted**" (Code § 300-11B [emphasis added]). Thus, under the plain terms of the Code, the one main building, one accessory building per lot rule is expressly excluded from the C-3 District, which means that having more than one principal use on a lot is completely permissible in the C-3 District provided the lot is of a sufficient size. Indeed, it is undisputed that there are other properties in the C-3 District that had more than one main use, albeit, none of them involved having a GFS as one of the

main uses. This, however, is a distinction without a difference.

Here, because it was proper for the Town Board to decide that a GFS primary use could coexist with a big box retail use, many of Petitioners' remaining arguments are superfluous since they are predicated on the GFS provision applying to the BJ's wholesale club as well. Moreover, the Court does not agree with Petitioners' contention that the GFS statute applies to the wholesale club because it contains a tire sales/service center and thereby falls within the definition of a GFS.

By reading the provision in isolation, Petitioners have violated a cardinal rule of statutory construction. In this regard, in determining legislative intent, statutory provisions are to be construed so as to avoid conflict and preserve the intent of the legislature. The duty of the court is to read and construe all parts of a statute as a whole, and where possible, harmonize the provisions and endeavor to give effect to every word (*see* Statutes §§ 97, 98; *Carney v Philippone*, 1 NY3d 333 [2004]). The definition entitled "Gasoline Filling Station" clearly reflects that the filling of gasoline is a critical component to the definition and while the definition states that a GFS encompasses "[a]ny area of land, including structures thereon, or any building or part thereof that is used for the sale of gasoline or motor vehicle accessories," it was not intended to cover a store that sells tires without also selling some type of motor fuel. This is reflected in (1) Code § 300-46 which provides that gasoline filling stations were to be limited to "the retail sale of motor fuels, lubricants **and** other motor vehicle supplies" (Code § 300-46[A][1] [emphasis added]); and (2) the remainder of the statute which regulates the location of the fuel pumps, underground storage tanks and canopies, none of which would have any application to the BJ's Tire Center. Petitioners do not contend that if there had been no fuel pumps associated with this Project, the Applicant Respondents would nevertheless have been required to obtain an SUP to operate the Tire Center. Here, the wholesale store, the Tire Center and the GFS are all independently authorized uses under Code § 300-21(C) (12). Finally, because the GFS statute does not apply to the wholesale building, Petitioners' argument that the language of Section 300-46 limits retail on a GFS to a 1,500 convenience store finds no support in the statute.

Turning to Petitioners' arguments that the SUP issuance was arbitrary and capricious because it did not comport with the CP, the Court agrees that to the extent that the BJ's Project was antithetical to the CP, it would provide a basis for finding the determination to be irrational (*cf.*

Francis Dev. and Mgt. Co. v Town of Clarence, 306 AD2d 680 [4th Dept 2003]). The converse is also true -- namely, that to the extent the approval was consistent with the CP, that would provide a basis for finding that the determinations were rational. For example, in *Francis Dev. and Mgt. Co,* although the Town's zoning code permitted mini storage facilities with the issuance of a special exception use permit, because the mini storage facility conflicted with the Town's recently adopted Master Plan, and because Section 30-71[A][7] of the Zoning Ordinance established as a condition for the issuance of a special exception use permit that "'[s]uch use shall not conflict with the direction of building development in accordance with any Master Plan ...," the Appellate Division, Fourth Department found that compliance with that statute must be complied with before any exception permit could be issued – *i.e.,* the application for the special exception permit could not issue because it conflicted with the newly adopted Master Plan.

The Court also does not agree with Petitioners' argument that the Town Board's approval of the SUP violated Section 300-36(B) by devaluing neighboring properties. In their argument, Petitioners use ellipses to omit the beginning of that provision, which makes clear that it is only "[t]he location, nature and height of the buildings, walls and fences and the nature and extent of the landscaping on the site" that had to be considered so as to prevent devaluing adjacent properties. Here, not only is there no adjacent property owner that is a petitioner in this case, there is also no issue over the "location, nature and height of the buildings, walls and fences" or landscaping. Instead, Petitioners' grievance has to do with the big box retail use being combined with a GFS. Accordingly, there is no basis for this Court to annul the Town Board's SUP approval on the ground that it is violative of Code § 300-36(B).

Finally, the Court finds nothing arbitrary or capricious about the Town Board's varying the requirements for the canopy height and signage. Code § 300-46(Q) specifically permits the Town Board to vary those requirements for good cause shown and with regard to each variation, the Town Board explained the rationale for why it was granting the request. Thus, the Town Board granted a variance with regard to the maximum canopy height of 18 feet by allowing 18 feet at the south end but 20.5 feet at the north end because of the slope of the existing paved area that the GFS was to be located. The Town Board also allowed the signage to exceed the requirements in terms of: (1) number of BJ'S GFS signs (three rather than the two permitted); (2) square footage

(41.46 s.f. rather than the 30 s.f. permitted); and (3) two price signs rather than the one permitted. The Town Board articulated the reason for allowing the variance for the signage was that the GFS was internally configured within the parking lot of the BJ's wholesale club and, therefore, "the signage proposed allows for the most effective and logical visibility" and the "computer renderings demonstrat[ed] that the signage would be aesthetically consistent with the Shopping Center and streetscape." Given the foregoing, the Court finds that there was nothing arbitrary or capricious in the Town Board's decision to grant variances on the signage and canopy height based on their finding of good cause for such variances. Finally, while Petitioners' alleged that there were other variances that were required concerning more than two GFSs per 1,000 feet, parking, driveways and curb cuts, based on Record (R1148-1149, R1161, 1164), the Court does not see that variances were required as the project complied with the Code in terms of only 2 GFSs within 1,000 feet of each other (e.g., BJ's and Gulf), parking, and given the internal configuration of the GFS (i.e., no direct access from Rt. 202 to GFS), the curb cuts and driveways.

PETITIONERS' THIRD CAUSE OF ACTION

With regard to the Town Board's alleged failure to take a hard look under SEQRA, Petitioners argue that the Town Board issued its SEQRA findings without consideration of: (1) the cumulative effects of the Costco Project, BJ's Project and State Lands Project; (2) the socio-economic impacts; (3) the traffic impacts; and (4) the stormwater/water quality impacts. Petitioners further contend that the Town Board's SEQRA determination was arbitrary and capricious because the action was listed as an Unlisted Action but should have been listed as a Type 1 action given its proximity to parkland. Finally, Petitioners contend that the SEQRA determination should be annulled because the granting of an SUP and the rezoning of the portion of the Staples Plaza were contrary to the CP.

Starting with the last contention first, the Town Board's adherence to the CP in rendering its determinations is relevant to the inquiry over whether the determination was arbitrary and capricious. In this regard, 6 NYCRR § 617.7(c)(iv) provides that "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" must be

considered in determining the adverse impacts of an action." However, as set forth *supra,* the Court finds that the issuance of the SUP and the rezoning were both done in accordance with the CP.

Because, at times, there has been an attempt to put before this Court information that was not contained within the record of the proceedings before the Town Board, the Court notes that its review of the Town Board's SEQRA decision is limited to the record made before the Town Board (*Matter of Kelly v Safir*, 96 NY2d 32 [2001]; *Montalbano v Silva*, 204 AD2d 457 [2d Dept 1994]). Therefore, the Court has not considered the submissions made in the Bacon Reply Aff. that were *dehors* the record.

"The primary purpose of SEQRA is "to inject environmental considerations directly into governmental decision making ... To that end, the statute mandates the preparation of an environmental impact statement (EIS) when a proposed development project "may have a significant effect on the environment" (*Apkan v Koch,* 75 NY2d 561, 570 [1990]). A lead agency is charged with "act[ing] and choos[ing] alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects" (*id.*).

Where an agency has followed the procedures required by SEQRA, a court's review of the substance of the agency's determination is limited" (*Eadie v Town Bd. of Town of Greenbush,* 7 NY3d 306, 318 [2006]). In this regard, the Court of Appeals has made clear that "[j]udicial review of an agency determination under SEQRA is limited to 'whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination'" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [citations omitted]; *see also Matter of Village of Kiryas-Joel v Village of Woodbury*, 138 AD3d 1008 [2d Dept 2016]; *Committee to Stop Airport Expansion v Wilkinson*, 126 AD3d 788 [2d Dept 2015]). Because it is not the "province of the courts to second-guess thoughtful agency decisionmaking ... an agency determination should be annulled only if it is arbitrary, capricious or unsupported by the evidence" and it is not the role of the courts to "'weigh the desirability of any action or [to] choose among alternatives'" (*id., quoting Akpan v Koch,* 75 NY2d 561, 570 [1990], *quoting Matter of Jackson v New York State Urban Dev. Corp.,*

67 NY2d 400, 417 [1980]). "The agency's 'substantive obligations under SEQRA must be viewed in light of a rule of reason' and agencies have 'considerable latitude in evaluating environmental effects and choosing among alternatives'" (*Eadie, supra*, 7 NY3d at 318, *quoting Webster Assoc. v Town of Webster*, 59 NY2d 220 [1983]). "Nevertheless, an agency, acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors" (*Apkan v Koch,* 75 NY2d 561, 570 [1990]). "Where an agency fails to take the requisite hard look and make a 'reasoned elaboration', or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence[32], the agency's determination may be annulled" (*Matter of WEOK Broadcasting Corp. v. Planning Bd. of the Town of Lloyd*, 79 NY2d 373, 383 [1992]).[33] An agency cannot base its determinations of significance on "no more than

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[32]The Court of Appeals in *Matter of WEOK Broadcasting Corp.* defined substantial evidence as being "'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" or "'the kind of evidence on which reasonable persons are accustomed to rely in serious affairs'" (*Matter of WEOK Broadcasting Corp.*, 79 NY2d at 383; *quoting 300 Gramatan Avenue Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978] and *People ex rel. Vega v. Smith*, 66 NY2d 130, 139 [1985]).

[33]In *Matter of WEOK Broadcasting Corp.*, petitioner had provided empirical data showing that there would be no visual impact to neighboring properties as a result of the project in question and the neighbors rebutted this data with generalized objections which argued that a neighboring property would necessarily be visually impacted by the project. The Court reversed the Agency's finding of a significant environmental impact holding:

> Respondent's finding that there may be a visual impact from the FDR homestead is unsupported by any factual data, scientific authority or any explanatory information such as would constitute substantial evidence. Thus, respondent's conclusory finding that there would be an unacceptable negative aesthetic impact ... cannot be deemed 'reasoned elaboration' of its determination .... Although a particular kind or quantum of 'expert' evidence is not necessary in every case to support an agency's SEQRA determination, here, the record contains no factual evidence, expert or otherwise, to counter the extensive factual evidence submitted by petitioner. To permit SEQRA determinations to be based on nor more than

generalized, speculative comments and opinions of local residents and other agencies" (*Matter of WEOK Broadcasting Corp.*, 79 NY2d at 384-385).

While the first meeting with the Town Board occurred on July 8, 2014, the SEQRA review began in earnest in August 2014 when the Applicant Respondents submitted their Rezoning Petition and EAF. On September 2, 2014, the Town Board declared its intent to act as Lead Agency (R0028) and in a resolution adopted on October 28, 2014, the Town Board assumed the role as lead agency (R0034). The Applicant Respondents attended Town Board meetings on July 8, 2014, September 2, 2014 and October 14, 2014 to address questions regarding their application and attended three meetings before the Town's Planning Board on September 22, 2014, October 6, 2014 and October 20, 2014. The Town Planning Board issued two memoranda dated October 31, 2014 and December 8, 2014 wherein the Planning Board (1) recommended that the southernmost proposed C-3 Zoning District line on Lot 75 be revised to encompass the BJ's Building, but not the entire Lot 75, so as to leave a C-1 buffer between the BJ's building and the adjoining residential properties; and (2) recommended that the Town Board adopt a negative declaration regarding the Project after concluding that the EAF and the supplemental materials had "identified analyzed, and shown mitigation for all possible significant impacts." (R0659; R0716), The Applicant Respondents also appeared before the Conservation Board and in a memorandum dated September 18, 2014, it opined that the rezoning petition would not result in any environmental impacts (R0071). In a memorandum dated September 23, 2014, the Advisory Board on Architecture and Community Appearance stated that it had no objection to the Town Board granting the rezoning petition (R0073). After a public hearing on December 16, 2014, and a special meeting on December 19, 2014, the Town Board issued a resolution determining the action should be classified as an Unlisted Action, and that it would not have a significant effect on the environment for the reasons set forth in its attached Negative Declaration Form (R1167-1182). In the Negative

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> generalized, speculative comments and opinions of local residents and other agencies, would authorize agencies conducting SEQRA reviews to exercise unbridled discretion in making their determinations and would not fulfill SEQRA's mandate that a balance be struck between social and economic goals and concerns about the environment .... (*Matter of WEOK Broadcasting Corp.*, 79 NY2d at 384-386).

Declaration, the Town Board noted that because the site was a fully developed Shopping Center, there would be minimal disturbance (*i.e.*, removal of vegetation) since all improvements were to be located in areas that were previously developed (R1175). The Town Board, relying on the EAF and supplemental materials provided by the Applicant Respondents, together with their independent review with their consultants, analyzed the potential impacts to (1) land and wetlands (no impacts); (2) water (Board found SWPPP designed in accordance with the requirements of the New York State Department of Environmental Conservation [NYSDEC] SPDES General Permit No. GP-0-10-001, effective January 29, 2010, and Chapter 248 "Stormwater Management and Erosion Sediment Control" the Town of Yorktown Zoning Code and the Project "would employ a variety of practices to enhance stormwater quality and reduce peak rates of runoffs associated with the proposed improvements" [R1175]); (3) air (no impacts); (4) plants and animals (no impacts); (5) agricultural land resources (no impacts); (6) aesthetic resources (based upon renderings provided, both Town Board and Advisory Board on Architecture and Community Appearance found that it would not result in any significant adverse impacts since it was to be installed on what is presently an underutilized and unattractive portion of the existing parking lot); (7) open space and recreation (no impacts); (8) critical environmental areas (no impacts); (9) transportation (based on traffic study provided, mitigation measures proposed, the Town Board's consultants' review and review of Planning Board, no adverse traffic or circulation impacts); (10) energy (no impacts); (11) noise and odor (while temporary noise impacts with construction during a 12-18 month period, activities will conform with regulations); (12) public health (based on Operational Summary provided by Applicant Respondents regarding training and oversight, BJ's Spills and Spills Prevention Plans, Gasoline Station Waste Disposal Recordkeeping Requirements, Outdoor Storage Criteria and standards regarding Spill Supplies, and fire safety, Board determined that there was no anticipated negative effects as there was "no significant risk of releases of hazardous or solid wastes or similar substances" (R1177); (13) growth and character of the community (no anticipated adverse impacts as project was in accordance with CP, furthered the CP's goals, served the general welfare of the community, and rezoning was consistent with adjacent zoning thereby providing consistency).

With regard to the potential traffic impacts, Petitioners take issue with the traffic study generated by the Applicant Respondents' traffic consultant because it used stale 2009 traffic numbers from the Costco DEIS, it relied on a BJ's from Brookield CT which is not an analogous site, it failed to take into consideration impacts from the State Lands site, and it failed to look at the impacts to the intersection of Route 202 and the Taconic State Parkway. However, a review of the record reveals that these alleged deficiencies were specifically addressed by Applicant Respondents' traffic consultant both at the Public Hearing on 12/19/14 (R1053-1058), and though JMC's follow up letter dated December 18, 2014 (R1142-1148) (*e.g.*, 2009 numbers were increased by 2% a year, Brookfield, Connecticut BJ's was analogous because it had a Costco up the street and was adjacent to significant thoroughfares [I-84 and Route 7], and the intersection was analyzed by JMC who relied on $3 million in improvements to the intersection being proposed by Costco). The fact that Petitioners' expert disputes those impacts is not determinative of whether or not SEQRA was fulfilled because it is well settled that "[a]n agency may rely on consultants to conduct analyses that support their environmental review of proposed projects ... The choice between conflicting expert testimony rests in the discretion of the administrative agency" (*Matter of Brooklyn Bridge Legal Defense Fund, Inc. v New York State Urban Dev. Corp.*, 50 AD3d 1029, 1031 [2d Dept 2008]). Thus, the Town Board was not required to accept the opinions of the Petitioners' experts over the other consultants (*Thorne v Village of Millbrook Planning Bd.*, 83 AD3d 723, 727-726 [2d Dept 2011], *lv denied* 17 NY3d 711 [2011]).

The same holds true with regard to the other impacts Petitioners contend were insufficiently addressed, namely the stormwater and water quality, and the socio-economic effects.

With regard to Petitioners' contention that the negative declaration must be annulled because the Town Board did not consider the cumulative effects of the proposed Costco and State Lands Projects, the Court finds the record reflects that the cumulative effects of the Costco and BJ's Projects were taken into consideration. With regard to the State Lands site which only had a conceptual project on the table, SEQRA does not require a lead agency to consider cumulative impacts. Instead, a lead agency may choose "in its discretion, not to examine the cumulative impact of separate applications within the same geographic area" (*Matter of Save the Pine Bush v City of Albany, supra, at 205; see Matter of Long Is. Pine Barrens Socy. v Planning Bd.*, supra, at

513; *Matter of Ecumenical Task Force v Love Canal Area Revitalization Agency,* 179 AD2d 261, 268 [4th Dept 1992], *lv denied* 80 NY2d 758 [1992]). Thus, unless there "is the existence of a 'larger plan' for development," such cumulative impacts need not be considered *(Matter of North Fork Envtl. Council v Janoski,* 196 AD2d 590, 591 [2d Dept 1993]). Here, it is undisputed that at the time of the BJ's approvals, there was no specific project before the Board on the State Lands site.

Turning to the sufficiency of the Town Board's consideration of socioeconomic impacts, while SEQRA review requires a lead agency to take a hard look at the socioeconomic impacts of a project on the community as a whole, including "the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment ... the agency is not obligated to separately consider the impact on a particular subgroup or upon particular individuals" (*Anderson v NYS Urban Dev. Corp.*, 45 AD3d 583, 585, [2d Dept 2007]). Petitioners' arguments concerning the insufficiency of the F&A analysis in that it did not take into consideration that there would be existing GFSs that would be put out of business and that those properties could not be redeveloped in some other manner boil down to Petitioners' dispute as to the accuracy of the Applicant Respondents' expert's report as opposed to the Petitioners' expert report. And in any battle of the expert situation, the Court must defer to the municipality's decision to give more weight to one expert over another. Contrary to Petitioners' position, the decision in *Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, (140 AD3d 1767 [4th Dept 2016]), does not require a contrary result since in *Wellsville*, unlike this case, there was no expert consideration of the community character impacts, including the potential displacement of residents or businesses. Here, the Town Board properly credited the opinion provided by F&A concerning the socio-economic (community) impacts of the project.

Petitioners take issue with the water related impacts -- namely, that the Town Board failed to take the hard look at the impacts to flooding and potential for increased phosphorous run-off to the Hunter Brook, which is a tributary to the New Croton Reservoir – the water source for New York City and Westchester residents. Petitioners' position is predicated on a letter from the DEP in October 2014, prior to the approvals (R0074 and Bacon Reply Aff., Ex. A). To begin with, the Town Board found in its resolutions that "in the supplemented EAF the applicant addressed the

stormwater management issues raised by the NYCDEP" (R1169). Further, it is well settled that the DEP's review of a submitted SWPPP is not the same review required in connection with a determination of environmental significance and a lead agency does not have to await all involved agencies' permitting decisions before it may render its SEQRA findings. As noted by the New York Court of Appeals, "[t]hough the SEQRA process and individual agency permitting processes are intertwined, they are two distinct avenues of environmental review. Provided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency need not await another agency's permitting decision before exercising its independent judgment on the issue" (*Matter of Riverkeeper, supra,* 9 NY3d at 234 [lead agency did not abdicate SEQRA responsibility despite plans having been changed subsequent to SEQRA findings since "the Board's file included the permit applications for wetlands activities, the State Pollutant Discharge Elimination System and the Stormwater Pollution Prevention Plan. Here, there was no deferral of the Town Board's consideration of the potential stormwater runoff/water quality issues"]). Here, BJ's presented evidence concerning (1) the state of the art underground tanks and piping that it was going to be utilizing to avert spills which exceeded the minimum requirements established by the USEPA (R0122); (2) the SWPPP that would meet the requirements of (i) NYC DEP's Rule and Regulations for the Protection from Contamination, Degradation and Pollution of NYC Water Supply and Sources, Amended 4/9/10, (ii) Chapter 238 Stormwater Management Erosion and Sediment Control of Town of Yorktown Zoning Code; and (iii) NYS DEC General Permit GP-0-10-001 last revised 1/29/10 (i.e., that the stormwater facilities were designed such that the quantity and quality of stormwater runoff during and after construction are not adversely altered or enhanced when compared to pre-development conditions [R0255]); (2) the training and operational regulations that it was going to employ to prevent human error but in the event of such error, the manner in which spills would be handled (R0122; R1032). The Applicant Respondents' addressed the fact that the Project was a redevelopment so that Chapter 9 of NYS Stormwater Management applied and also, that it was in the NYC Watershed so Chapter 10 and phosphorous requirements apply. However, he pointed out that the systems BJ's was implementing were more than any other gas station in the area currently employed and that while the system could not capture all the soluable contaminants, he noted that less than 1% of what is in gas is soluable and

that such soluable contaminants are not easily removed (R1046). He further explained that it was considered beneath what is practical to address and was akin to the slick on the surface of roads that are newly paved (R1042-1046). Accordingly, the Applicant Respondents did address Petitioners' expert's criticism of their SWPPP and explained why the issues he raised were so *de minimus* that they could not be considered to raise significant environmental impacts. While the Court did not see a specific response to the issue of the Project's failure to remedy the contaminants from the de-icing that occurred on the parking lot, given that the Project did little, if nothing, to increase the impervious area involved, the Court is at a loss to understand why the Board was required to investigate whether such an issue was sufficiently mitigated during the SEQRA review.

At its essence, the BJ's Project involved little to no land disturbance or visual impacts since it was contained within fully developed big box Shopping Center and parking lot. With regard to the potential impacts in terms of community character (socio-economic), traffic, and water, the record reveals that the Town Board identified the areas of environmental concern, took a hard look at them, and determined that there would be no significant environmental impact as the result of the BJ's Project. The Court further notes that two other Town Boards (Planning Board and Conservation Board) likewise recommended that the Town Board issue a negative declaration. Because the Court has concluded that the Town Board took the requisite hard look in making its negative declaration under SEQRA, that such determination was neither arbitrary nor capricious and that it was based on substantial evidence, Petitioners' requests that the SUP and zoning map change emanating from those findings be annulled based on the deficient SEQRA findings shall also be denied (*Matter of Highview Estates of Orange County, Inc. v Town Bd. of Town of Montgomery*, 101 AD3d 716 [2d Dept 2012]).

Petitioners' argument that the SEQRA negative declaration must be annulled based on the Town Board's erroneous classification of the action as Unlisted rather than Type I Action does not alter this Court's determination. The issue over whether the action should have been classified a Type I boils down to whether the Project is located "wholly or partially within or substantially continuous to any publicly owned or operated parkland, recreation area or designated open space" (*see* 6 NYCRR §617.4[b][10]). Petitioners argue that the Project was misclassified as an Unlisted

Action because the Shopping Center is "substantially contiguous" to the Bear Mountain Parkway ("BMP"), which is state parkland, given its proximity. Petitioners further argue that this misclassification of the Project is significant, because as a Type I action, the Project would have required an EIS. In response, Respondents argue that because only one corner of the Shopping Center is located diagonally across from parkland associated with the BMP -- the project is not "in close enough proximity that it should be considered 'substantially contiguous' for the purpose of classifying the Project as a Type I action."

Petitioners place great weight on the language which states "any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR Part 62, 1994" (6 NYCRR § 617.17[4]).

While it is undisputed that the Project is not located "wholly or partially within" parkland, the issue is whether the Project's location should be considered "substantially contiguous" to parkland within the meaning of 6 NYCRR §617.4(b)(10). The parkland in question abuts the BMP and is a distance of 82 feet to the closest property line of the Staples Shopping Center, 393 feet from the closest point of rezoning, and 236 feet from the closest point of the proposed GFS.

The Court finds the Town Board's classification of the Project as an Unlisted Action was rational and reasonable based upon all the factors (*see Matter of Riverkeeper, Inc. v Planning Bd of Town of Southeast*, 9 NY3d 219 [2007]). The Department of Environmental Conservation, the agency in charge of implementing SEQRA, has indicated that it interprets substantially contiguous to mean in proximity to or near (6 NYCRR §617.4[b][10]). The DEC provides that "[t]he term substantially contiguous as used in both Section 617.4(b)(9) and (10), is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact" (*see Sierra Club v Village of Painted Post*, 26 NY3d 301 [2015], *citing* SEQR Handbook at 24 [3d ed.2010]; *Matter of Jiles v Flowers*, 182 AD2d 762 [2d Dept 1992]). While both sides can argue that a distance of almost 400 feet meets or does not meet the threshold for "substantially contiguous," the Court believes the important inquiry is whether the Project is in close enough proximity to the parkland that it could

potentially have an impact. Here, the Project is a GFS to be built on an already existing Shopping Center parking lot — i.e., a small part of a much larger, existing commercial use. The Project will only increase the impervious surface by 0.18 acre (R0255) and there is some evidence in the record that with regard to the BJ's portion of the project, there is a net decrease of 2,500 feet of impervious surface (R1031), Obviously, the impact on the parkland was relevant at the time when the BJ's Wholesale club was first approved back in the early 1990's as opposed to now, when the only impact is the change from an underutilized parking lot to a 12 pump GFS and 200 square foot kiosk.

In any event, the Court agrees with Respondents that even assuming *arguendo*, the Project should have been classified as a Type I Action, the error was harmless. Unlisted Actions constitute a residuary of actions under SEQRA which require an environmental assessment to ascertain whether preparation of an EIS is necessary (*Matter* of *Rusciano & Son Corp v Kiernan*, 300 AD2d 590 [2d Dept 2002], *lv denied* 99 NY2d 510 [2003]; *see also Chatham Green, Inc. v Bloomberg*, 1 Misc 3d 434, 438 [Sup Ct, NY County 2003], *citing* 6 NYCRR §617[a][3]). Although SEQRA regulations provide that a Type I Action carries a presumption that it is likely to have a significant adverse effect on the environment and may require an EIS (*see* 6 NYCRR 617.4[a][1]); *Matter of S.P.A.C.E. v Hurley*, 291 AD2d 563 [2d Dept 2002], *lv denied* 98 NY2d 615 [2002]), contrary to Petitioners' position, an EIS is not required simply based on a Type I classification (*see* 6 NYCRR § 617.4). The question of SEQRA compliance is not whether a particular form is filled out but whether the substantive analysis was performed (*Matter of Wellsville Citizens for Responsible Dev., Inc., supra*; *Horn v Westchester County*, 106 AD2d 612 [2d Dept 1984]). Here, the Town Board, after reviewing a comprehensive EAF which evaluated and proposed mitigation measures for a variety of potential environmental impacts, including gas station operations, water impacts, visual analysis, site lighting, and traffic impacts, properly issued a negative declaration that no significant environmental impact would result from the Project (*see Matter of Spitzer v Farrell*, 100 NY2d 186 [2003]). Based on the foregoing, even if the action should have been classified as a Type I Action, the error was harmless because the Town Board properly determined that the Project would have no significant adverse environmental impacts when it issued its Negative Declaration and there was no need for an EIS to be prepared.

PETITIONERS' SEVENTH CAUSE OF ACTION

The essence of Petitioners' Seventh Cause of Action is that in the past, as against the existing GSFs along the Rt. 202/35 corridor, the Town Board rigorously enforced Code § 300-46 with regard to the GFSs' requests for variances from those requirements (e.g., retail space for convenience stores, curb cuts, driveway design, signage, canopies) whereas with the BJ's Project, the Town Board granted variances allowing gross exceedances to those same requirements. The Court finds that Petitioners' Seventh Cause of Action fails to state a claim upon which relief may be granted, and the Seventh Cause of Action shall be dismissed.

In the land-use context, 42 U.S.C. § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution (*Bower Assoc. v Town of Pleasant Valley*, 2 NY3d 617, 262 [2004]).

Here, other than a single conclusory sentence, Petitioners failed to substantively oppose the branch of Respondents' motion seeking to dismiss their due process claim. As such, this branch of Respondents' motion shall be granted (*Agoglia v Benepe*, 84 AD3d 1072, 1075 [2d Dept 2011]; *see also Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2d Dept 2012]; *Sanchez v Village of Ossining*, 271 AD2d 674, 675 [2d Dept 2000]). Furthermore, even if Petitioners had opposed this branch of Respondents' motion, Respondents' motion would nevertheless be granted since Petitioners have not shown in support of their due process claim that they have (1) a vested property interest; and (2) that the government action was without legal justification (*Bower Assoc. v Town of Pleasant Valley*, 2 NY3d 617 [2004]).

With regard to the first element, "[w]here an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion 'is so narrowly circumscribed that approval of a proper application is virtually assured'" (*Bower Assoc.*, 2 NY3d at 628). With regard to the second element, "'only the most egregious official conduct can be said to be arbitrary in the constitutional sense'" (*id., quoting City of Cuyahoga Falls, Ohio v Buckeye Community Hope Found.*, 538 US 188, 198 [2003]).[34]

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[34]In *BAM Historic District Assn. v Koch*, (723 F2d 233 [2d Cir 1983]), the U.S. Court of Appeals for the Second Circuit dismissed a due process claim regarding an approval of a homeless shelter

Here, there is no basis for Petitioners to claim that they were denied due process of law since they have not submitted any proof that the Town Respondents' decision to limit their convenience stores to 1,500 square feet was contrary to the GFS statute. Furthermore, given the provisions of the GFS requiring five parking spaces per 1,000 square feet of convenience store, the approval of larger convenience stores could not have been virtually assured. Second, given that this Court has already determined that the Town Board's determinations with regard to the rezoning, the issuance of the SUP, and the Negative Declaration were neither arbitrary nor capricious and further, that such determinations were based on substantial evidence, the second element (*i.e.*, egregious conduct) has not been met as a matter of law.

With regard to Petitioners' equal protection claim, "[t]he Equal Protection Clause requires that the government treat all similarly situated people alike" (*Harlen Assoc. v Incorporated Village of Minneola*, 273 F3d 494, 499 [2d Cir 2001]). Where the plaintiffs involved are not part of a suspect class, they are nevertheless entitled to bring equal protection claims based on a class of one. Here, Petitioners concede that their equal protection claim is in the nature of a "class of one" (Ps' Reply at 72). The three elements to a class of one claim are that: (1) the person received different treatment than others similarly situated, (2) the disparate treatment was irrational, wholly arbitrary, and intentional (*Willowbrook v Olech*, 528 US 562, 564-565 [2000]). Again, the Court has already determined that the Town Board's decisions were rationally-based. In addition, the GFS Petitioners have not alleged, nor could they allege, that they are similarly situated to the Applicant Respondents given the disparity in the size of their properties as compared to the Applicant Respondents' property. Finally, Petitioners have not alleged an improper motive. Accordingly, as Petitioners have failed to sufficiently allege a claim that their rights of equal protection have been violated, Petitioners' Seventh Cause of Action shall be dismissed.

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in a neighbourhood holding that "[g]overnmental action [allegedly causing a decline in property values] has never been held to 'deprive' a person of property within the meaning of the Fourteenth Amendment" (*id.* at 237).

PETITIONERS' EIGHTH, NINTH AND TENTH CAUSES OF ACTION

Petitioners' Eighth Cause of Action seeks to annul an amended site plan granted by the Town's Planning Board on May 4, 2015, which was filed on or about June 17, 2015. It is undisputed that this action was commenced before the Planning Board's approval since the action was filed on April 15, 2015. It is further undisputed that it was not until on or about November 10, 2015 that Petitioners added their claim challenging the Planning Board's site plan approval. Because a challenge to a site plan approval must occur within 30 days of the filing of the site plan, and because Petitioners have again failed to even oppose this branch of Respondents' motion, the Court shall dismiss the Eighth Cause of Action as barred by the relevant statute of limitations.

With regard to Petitioners' Ninth Cause of Action seeking preliminary and permanent injunctive relief, because the Court is dismissing all of the substantive claims found in the Amended Petition/Complaint, it is evident that Petitioners' cause of action seeking an injunction has been rendered moot and shall be dismissed.[35]

Finally, with regard to Petitioners' Tenth Cause of Action for costs under CPLR Article 86, disregarding whether or not CPLR 8600 would even be applicable against the Town Respondents, Petitioners' Tenth Cause of Action seeking an award of their counsel fees and expenses pursuant to CPLR 8600 *et seq.* (State Equal Access to Justice Act) would nevertheless be dismissed as Petitioners are not the prevailing parties to this proceeding.

CONCLUSION

The Court has considered the following papers in connection with the Petition and Respondents' motion:

(1) Amended Notice of Petition dated December 8, 2015;
(2) Amended Petition and Complaint dated November 10, 2015, Exhibits 1-19;
(3) Memorandum of Law in Support of Petition dated November 10, 2015;
(4) Affidavit of Michael Maris, sworn to October 30, 2015; Affidavit of Faisal Akram, sworn

[35] Further, given this Court's dismissal of Petitioners' other causes of action, Petitioners have not established a likelihood of success on the merits (one of the three prongs required for injunctive relief).

to November 6, 2015; Affidavit of Jonathan Nettelfield, sworn to November 7, 2015; Affidavit of Paul Gill, sworn to October 25, 2015; Affidavit of Reyad Mussa, sworn to November 4, 2015; Affidavit of Vincent Scotto, sworn to November 4, 2015; Affidavit of Dharmarajan Iyer, Ph.D., P.E., sworn to October 31, 2015;

(5) Answers;

(6) Notice of Motion to Dismiss dated January 6, 2016; Affirmation of Jeannette Koster, Esq. dated January 6, 2016, together with the exhibits annexed thereto; Affidavit of Vince Ferrandino, AICP, sworn to December 8, 2015; Affidavit of Nelson Cabral, sworn to December 7, 2015;Affidavit of Robert Aiello P.E., sworn to December 30, 2015, together with the exhibits annexed thereto; Affidavit of John G. Dzwibczk, P.E., C.F.P.S., sworn to January 4, 2016, together with the exhibit annexed thereto; Affidavit of Richard J. Pearson, P.E., P.T.P.W., sworn to December 30, 2015, together with the exhibit annexed thereto;

(7) Respondents' Joint Memorandum of Law in Opposition to the Amended Petition and Complaint and in Support of Motion to Dismiss dated January 6, 2016;

(8) Reply Memorandum of Law dated February 5, 2016; Affidavit in Support of Reply of Jonathan Nettelfield, sworn to February 2, 2016; Affidavit in Support of Reply of Paul Moskowitz, Ph.D., P.E., sworn to February 1, 2016, together with the exhibits annexed thereto; Affidavit in Support of Reply of Lawrence Centore, sworn to February 3, 2016 together with the exhibit annexed thereto; Affirmation in Support of Reply of James Bacon, Esq. dated February 5, 2016, together with the exhibits annexed thereto;

(9) Reply Affirmation of David S. Steinmetz, Esq. dated February 10, 2016;

(10) Letter dated June 24, 2016 from James Bacon, Esq. to Hon. Gretchen Walsh, J.S.C. enclosing a copy of *Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 2016 NY Slip Op 04847 (4th Dept 2016);

(11) Letter dated June 28, 2016 from David S. Steinmetz, Esq. and Jody T. Cross, Esq. to Hon. Gretchen Walsh, J.S.C. (which was joined by the Town Respondents) responding to June 24, 2016 Letter from James Bacon, Esq.and attaching a copy of decision in *Matter of CPD N.Y. Energy Corp. v Town of Poughkeepsie Planning Board*, 139 AD3d 942 [2d Dept 2016]).

Based on the foregoing, and for the reasons set forth above, it is hereby

ORDERED, that Amended Petition is hereby dismissed; and it is further

ORDERED that Respondents shall, pursuant to the provisions of 22 N.Y.C.R.R §202.48, submit a proposed judgment to this Court (and not the Clerk of the Court), noticed for settlement on January 26, 2017 (on submission, no appearances required); and it is further

ORDERED that Respondents' counsel shall serve upon Petitioners' counsel by overnight delivery (next day delivery) and file with the Clerk of the Court, a copy of this Decision and Order with Notice of Entry, by no later than January 16, 2017.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 9, 2017

HON. GRETCHEN WALSH, J.S.C.

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